No. 13047

United States Court of Appeals

for the Ninth Circuit.

STANDARD ACCIDENT INSURANCE COMPANY OF DETROIT, MICHIGAN,

Appellant,

vs.

VIVIAN WINGET and THOMAS B. MACK,

Appellees.

VIVIAN WINGET,

Appellant,

vs.

STANDARD ACCIDENT INSURANCE COMPANY OF DETROIT, MICHIGAN and THOMAS B. MACK,

Appellees.

Transcript of Record

Appeals from the United States District Court, Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant and Cross-Appellee:

FULCHER & WYNN,
411 West 5th St.,
Los Angeles 13, Calif.

For Appellee and Cross-Appellant:

NEIL D. HEILY,
515 S. "A" Street,
Oxnard, Calif.

In the District Court of the United States
Southern District of California, Central Division

No. 12327-HW

VIVIAN WINGET,

Plaintiff,

vs.

STANDARD ACCIDENT INSURANCE COMPANY OF DETROIT, MICHIGAN, a Corporation, THOMAS B. MACK, JOHN DOE I and JOHN DOE COMPANY,

Defendants.

PETITION FOR REMOVAL OF CAUSE TO UNITED STATES DISTRICT COURT

To the Honorable District Court of the United States for the Southern District of California:

Your Petitioner, Standard Accident Insurance Company of Detroit, Michigan, a corporation represents as follows:

I.

That it is a corporation organized and existing under the laws of the State of Michigan, authorized to do business and doing business in the State of California, and authorized therein to write, execute, and deliver Automobile Personal Injury Policies of the type and kind hereinafter referred to; that the plaintiff is a citizen and resident of the State of California.

II.

That there is an actual and bona fide controversy presently existing between plaintiff and this defendant as to the liability of this defendant to plaintiff under the policy of Automobile Personal Injury [2*] Insurance referred to in the Complaint on file in the Superior Court of the State of California, in and for the County of Ventura, numbered 37786 in the files of said court.

III.

That although this defendant is not the sole defendant in the state court action above described, the above-mentioned claim against this defendant, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars, ($3,000.00); that the plaintiff and this defendant are citizens of different states, and that the claim asserted by plaintiff against this defendant upon said policy of insurance is one which would be removable to this Court if sued upon alone pursuant to the provisions of section 1332 and 1441, subdivision (c) title 28 of the United States Code; that the claim or claims of plaintiff asserted against the remaining defendants in said state court action involve claims which might otherwise be non-removable but which may be heard by and determined by this Court under the provisions of said section 1441(c) of the United States Code. That attached hereto, made a part hereof as fully as though at length set out, marked Exhibit "A," is a true and correct copy of the

*Page numbering appearing at foot of page of original Certified Transcript of Record.

policy of insurance referred to and described in plaintiff's Complaint, together with all riders and endorsements then or thereafter issued by defendant to plaintiff and attached to or made a part of said policy.

That attached hereto marked Exhibit "B" and made a part hereof as fully as though at length set out is a true and correct photostatic copy of the Summons and Complaint issued by the Superior Court of the State of California in and for the County of Ventura, together with Order to Show Cause, Temporary Restraining Order, and a Memorandum of Authorities in Support of Order and Injunction, which include all process pleadings and orders served upon this defendant in such state court action.

That said Summons and Complaint and other documents above [3] described or served upon your Petitioner within 20 days of the filing of this Petition for removal to the above-entitled Court.

Wherefore, your Petitioner prays that this Court accept jurisdiction of the subject matter, the controversy set forth in the Complaint filed in the Superior Court of the State of California in and for the County of Ventura between the plaintiff and this defendant as well as any other claims or causes of action which might not otherwise be removed to this Court; that all further proceedings in said state court be stayed; that this Court enter such orders, decrees, and judgments as may be proper in the premises; and that all further proceedings be held in the District Court of the United States for the

Southern District of California, Central Division.

Dated September 22, 1950.

By /s/ FREEMAN A. REED,
Claims Manager, Petitioner.

FULCHER & WYNN,

By /s/ CAROL G. WYNN,
Attorneys for Petitioner. [4]

EXHIBIT B

In the Superior Court of the State of California in and for the County of Ventura

No. 37786

VIVIAN WINGET,

Plaintiff,

vs.

STANDARD ACCIDENT INSURANCE COMPANY, a Corporation, THOMAS B. MACK, JOHN DOE I and JOHN DOE COMPANY,

Defendants.

COMPLAINT

Comes now the plaintiff in the above-entitled action and for cause of action against the defendants, and each of them alleges as follows:

I.

That plaintiff is a married woman over the age of 18 years and is one and the same person as Viv-

ian Lee DeLozier named in that certain action in the Superior Court of the State of California, in and for the County of Ventura entitled Vivian Lee DeLozier, a minor, by Lawrence E. DeLozier, her guardian ad litem, Plaintiff vs. Billie Ray Towry, John Doe I and John Doe Company, a corporation, Defendants, being action #36005.

II.

Said plaintiff is informed and believes and therefore alleges that defendant Standard Accident Insurance Company is a corporation duly organized, operating and existing under and by virtue of the laws of the State of Michigan and that said corporation is and has been [16] during all of the times hereinafter mentioned doing business in the State of California and has as its agent for service of process in the State of California one Roy W. Smith of 206 Sansome, San Francisco 4, California. That said defendant Standard Accident Insurance Company is hereinafter referred to as "Standard."

III.

That defendant Thomas B. Mack is one and the same person as the plaintiff in that certain action entitled Thomas B. Mack, Plaintiff vs. Billie Ray Towry, et al., Defendants on file in the Superior Court of the State of California in and for the County of Ventura as action #35511 and that said defendant is hereinafter referred to as "Mack." That said defendant is a citizen and resident of Ventura County, California.

Southern District of California, Central Division.

Dated September 22, 1950.

By /s/ FREEMAN A. REED,
Claims Manager, Petitioner.

FULCHER & WYNN,

By /s/ CAROL G. WYNN,
Attorneys for Petitioner. [4]

EXHIBIT B

In the Superior Court of the State of California in and for the County of Ventura

No. 37786

VIVIAN WINGET,

Plaintiff,

vs.

STANDARD ACCIDENT INSURANCE COMPANY, a Corporation, THOMAS B. MACK, JOHN DOE I and JOHN DOE COMPANY,

Defendants.

COMPLAINT

Comes now the plaintiff in the above-entitled action and for cause of action against the defendants, and each of them alleges as follows:

I.

That plaintiff is a married woman over the age of 18 years and is one and the same person as Viv-

ian Lee DeLozier named in that certain action in the Superior Court of the State of California, in and for the County of Ventura entitled Vivian Lee DeLozier, a minor, by Lawrence E. DeLozier, her guardian ad litem, Plaintiff vs. Billie Ray Towry, John Doe I and John Doe Company, a corporation, Defendants, being action #36005.

II.

Said plaintiff is informed and believes and therefore alleges that defendant Standard Accident Insurance Company is a corporation duly organized, operating and existing under and by virtue of the laws of the State of Michigan and that said corporation is and has been [16] during all of the times hereinafter mentioned doing business in the State of California and has as its agent for service of process in the State of California one Roy W. Smith of 206 Sansome, San Francisco 4, California. That said defendant Standard Accident Insurance Company is hereinafter referred to as "Standard."

III.

That defendant Thomas B. Mack is one and the same person as the plaintiff in that certain action entitled Thomas B. Mack, Plaintiff vs. Billie Ray Towry, et al., Defendants on file in the Superior Court of the State of California in and for the County of Ventura as action #35511 and that said defendant is hereinafter referred to as "Mack." That said defendant is a citizen and resident of Ventura County, California.

IV.

That defendants John Doe I and John Doe Company are sued herein under fictitious names for the reason that their true names are not at this time known and that when said true names have been ascertained by the plaintiff, she will ask that such true names be inserted in this complaint with apt and proper words to charge said defendants.

V.

That the two actions above mentioned being #36005 and #35511 were duly consolidated for trial and trial was had thereon and on the 31st day of March, 1950, judgments were entered on the verdicts in said actions in favor of the plaintiff and against defendant Billie Ray Towry therein named in the sum of Thirty-Two Thousand and no/100 ($32,000.00) Dollars with interest thereon at the rate of seven (7) per cent per annum from the 30th day of March, 1950, together with costs of suit and in favor of defendant Mack, therein named as plaintiff Thomas B. Mack, and against the defendant therein named Billie Ray Towry in the sum of Fifteen Thousand and [17] no/100 ($15,000.00) Dollars together with interest thereon at the rate of seven (7) per cent per annum from the 30th day of March, 1950, and together with costs of suit and that said judgments were entered and recorded in Book 27 of Judgments at Page 409, records of Ventura County Clerk, Ventura, California. That said judgments are final.

VI.

That the judgments so rendered on behalf of plaintiff and on behalf of defendant Mack as hereinabove described were for bodily injuries suffered by plaintiff and defendant Mack in an automobile accident while riding in the vehicle of said Billie Ray Towry on the 26th of January, 1949, at which time said Billie Ray Towry was driving his said vehicle on West Fifth Street near Oxnard, Ventura County, California.

VII.

That at the said time and place of said accident above mentioned there was in full force and effect a certain automobile bodily injury liability policy #J894065 issued by the defendant Standard to said Billie Ray Towry, also known as Billy Towry, under the terms of which policy the defendant Standard agreed to pay on behalf of said Billy Towry all sums which he might become obligated to pay by reason of liability imposed upon him by law for damages because of bodily injury sustained by any person or persons caused by accident and arising out of the ownership, maintenance or use of the vehicle above-mentioned up to the limit of Twenty Thousand and no/100 ($20,000.00) Dollars for such accident.

VIII.

That plaintiff is informed and believes and therefore alleges that said Billy Towry complied with all the provisions and conditions of said policy and that the same continued to be in full force and

effect and is now in full force and effect and was, especially, [18] on the 31st day of March, 1950, the date when the judgments above mentioned were entered, in full force and effect, insofar as said judgments are concerned.

IX.

That by reason of the provisions of said policy, defendant Standard is obligated to pay toward the satisfaction of said judgments above described the sum of Twenty Thousand and no/100 ($20,000.00) Dollars together with interest thereon at seven (7) per cent per annum from the 30th day of March, 1950, and costs of suit as in said judgment provided. That defendant Standard has refused to pay said sums or any portion thereof, and, as plaintiff is informed and believes, and therefore alleges, said Billy Towry has no assets whatsoever to apply on said judgments except said policy and said judgments remain wholly unsatisfied.

X.

That the total amount of said two judgments above mentioned is Forty-Seven Thousand and no/100 ($47,000.00) Dollars and that the Thirty-Two Thousand and no/100 ($32,000.00) Dollar judgment on behalf of plaintiff is 68.0851% of said Forty-Seven Thousand and no/100 ($47,000.00) Dollars and that plaintiff is entitled to 68.0851% of the principal sum of Twenty Thousand and no/100 ($20,000.00) Dollars which defendant Standard is obligated to pay under the terms of said policy, which is the sum of Thirteen Thousand Six Hun-

dred Seventeen and 02/100 ($13,617.02) Dollars, in partial satisfaction of said judgment on behalf of plaintiff against said Billy Towry.

XI.

That plaintiff is informed and believes and therefore alleges that defendant Mack claims he is entitled to Ten Thousand and no/100 ($10,000.00) Dollars of said Twenty Thousand and no/100 ($20,000.00) Dollars which said defendant Standard is obligated to pay under the terms of said [19] policy.

XII.

That plaintiff is informed and believes and therefore alleges that unless restrained from so doing, the defendant Standard will pay to defendant Mack a portion or all of said Ten Thousand and no/100 ($10,000.00) Dollars claimed by said defendant Mack in return for a satisfaction and release of said defendant Standard under the terms of said policy which would result in great and irreparable injury to the plaintiff, in this, to wit, that plaintiff is informed and believes and therefore alleges that she would be unable to thereupon collect anything in excess of the principal sum of Ten Thousand and no/100 ($10,000.00) Dollars payable to her under the terms of said policy and on said judgment against Billy Towry and that she could collect nothing from said defendant Mack, and that plaintiff would be hindered and delayed in collecting the amount due her on said judgment and the complete enforcement of any judgment rendered in this ac-

tion would be prevented. That defendant Standard should be required to pay into this Court the total sum of Twenty Thousand and no/100 ($20,000.00) Dollars due on said policy together with interest at seven (7) per cent per annum from the 30th day of March, 1950, and the costs of plaintiff and defendant Mack described in said two judgments, and that thereupon said principal sum with interest should be divided and paid in the ratio of 68.0851% to plaintiff and 31.9149% to defendant Mack together with their respective costs.

Wherefore, plaintiff prays judgment as follows:

1. That this Honorable Court make an order enjoining and restraining the defendant Standard Accident Insurance Company, its agents, servants or employees, from in any manner paying to or settling with defendant Thomas B. Mack for any sum or sums due or owing or alleged to be due or owing under the terms of that certain automobile bodily injury liability policy #J894065 issued by said Company to Billy Towry, pending final determination of this action; [20] and that said defendant Standard Accident Insurance Company be required to appear before the above-entitled Court at a specified time to show cause, if any it has, why such restraining order should not be made a temporary injunction until the final determination of this action.

2. That defendant Standard Accident Insurance Company be ordered to pay into the above-entitled Court the principal sum of Twenty Thousand and

no/100 ($20,000.00) Dollars due under the terms of said policy together with interest thereon at the rate of seven (7) per cent per annum from the 30th day of March, 1950, and that thereupon, out of said proceeds so paid into Court, this Court award to plaintiff the sum of Thirteen Thousand Six Hundred Seventeen and 02/100 ($13,617.02) Dollars together with interest thereon at the rate of seven (7) per cent per annum from the 30th day of March, 1950, and that this Court decree that the defendant Thomas B. Mack has no right, title or interest in said sum to be paid to the plaintiff.

3. That defendant Standard Accident Insurance Company be required to pay to plaintiff her costs of suit incurred in action #36005 above mentioned.

4. For her costs of suit incurred herein and for such other and further relief as to the Court may seem just in the premises.

/s/ NEIL D. HEILY,
Attorney for Plaintiff. [21]

State of California,
County of Ventura—ss.

Neil D. Heily, being sworn, says: That he is an attorney at law admitted to practice before all courts of the State of California and has his office in Oxnard, Ventura County, California, and is the attorney for plaintiff in the above-entitled action; that plaintiff is unable to make the verification because she is absent from said County and for that reason affiant makes this verification on plaintiff's

behalf; that he has read the foregoing Complaint and knows the contents thereof, and the same is true of his own knowledge, except as to those matters which are therein stated upon his information or belief; and as to those matters that he believes it to be true.

/s/ NEIL D. HEILY,

Subscribed and Sworn to before me this 15th day of September, 1950.

[Seal] /s H. F. ROSENMUND,
Notary Public in and for said County and State.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 23, 1950. [22]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT, STANDARD ACCIDENT INSURANCE COMPANY OF DETROIT, MICHIGAN

Comes Now the defendant, Standard Accident Insurance Company of Detroit, Michigan, a corporation, and for itself alone, and for none of its co-defendants, and answers plaintiff's complaint herein as follows:

First Defense

I.

The complaint fails to state a claim against this defendant upon which relief can be granted.

Second Defense

I.

Admits the allegations contained in paragraphs I, II, III, V, and VI.

II.

Defendant is without knowledge or information sufficient [24] to form a belief as to the truth of the allegations contained in paragraph IV.

III.

Answering paragraph VII, defendant admits that at the time of said accident there was in effect the policy of insurance therein described, copy of which policy is attached hereto, marked Exhibit "A" and made a part hereof. Except as specifically provided in said policy, defendant denies the allegations in said paragraph as to the terms and conditions thereof.

IV.

Denies each and all of the allegations contained in paragraph VIII.

V.

Answering paragraph IX defendant admits that it has refused to pay the amount therein mentioned or any other sum and admits that said judgments remain unsatisfied. Defendant is without knowl-

edge or information sufficient to form a belief as to the truth of the allegation that Billy Towry has no assets except said policy. Defendant denies each and all of the remaining allegations contained in said paragraph and denies that it is obligated to pay the amounts mentioned therein or any other sum.

VI.

Answering paragraph X, defendant admits the allegations as to the amount of said judgments but denies each and all of the remaining allegations contained in said paragraph.

VII.

Answering paragraph XI, defendant admits that the defendant, Mack, has made claim upon this defendant for the sum therein mentioned but denies that it is obligated to pay the sums mentioned in said paragraph or any other sums.

VIII.

Denies each and all of the allegations contained in [25] paragraph XII.

As a Third and Affirmative Defense
Defendant Alleges

I.

That the policy of insurance described in plaintiff's complaint, copy of which is attached hereto and made a part hereof and marked Exhibit "A," expressly provided as a condition thereof that said Billy Towry, would cooperate with this defendant

and assist defendant in securing and giving evidence.

II.

Dispite said express condition contained in said policy the said Billy Towry failed, neglected, and refused to cooperate with this defendant and failed, neglected, and refused to assist in securing and giving evidence but on the contrary concealed evidence from this defendant and made false and untruthful statements both to this defendant and in a sworn deposition intended for use upon the trial of said actions in the state court.

Wherefore, defendant prays that plaintiff take nothing by her action herein; and that defendant have judgment for its costs.

FULCHER & WYNN,

By /s/ CAROL G. WYNN,

Attorneys for Defendant, Standard Accident Insurance Company.

Insurance policy was made Winget's Exh. 4, at trial.

EME.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 2, 1950. [26]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT THOMAS B. MACK

Comes Now Defendant Thomas B. Mack, above named, and severing himself from his co-defendants, and for himself alone, in answer to plaintiff's complaint on file herein, denies, admits and alleges as follows:

I.

This answering defendant admits the allegations of Paragraphs I, II, III, V, VI, VIII, IX and XI of said complaint.

II.

In answer to Paragraph IV of said complaint, this answering defendant has no information or belief sufficient to enable him to answer to said paragraph and the allegations thereof, and basing his denial upon that ground, said defendant denies generally and specifically each and every allegation in said paragraph contained, [28] and the whole thereof.

II.

In answer to Paragraph VII of said complaint, this answering defendant admits said paragraph and the allegations therein contained; and in further answer to said paragraph and allegations, this answering defendant alleges that the policy of automobile bodily injury liability insurance No. J894065 issued by defendant Standard Accident Insurance Company, and referred to in said para-

graph, further contained a limitation of liability of Ten Thousand Dollars ($10,000.00) for each person.

III.

In answer to Paragraph X of said complaint, this answering defendant denies generally and specifically each and every allegation therein contained, and the whole thereof, save and except that this answering defendant admits that the total amount of said two judgments in said complaint referred to is Forty-seven Thousand Dollars ($47,000.00), and that the Thirty-two Thousand Dollar ($32,000.00) judgment on behalf of plaintiff is 68.0851% of said Forty-seven Thousand Dollars ($47,000.00). Further answering said paragraph and the allegations thereof, this answering defendant denies specifically that plaintiff is entitled to Thirteen Thousand Six Hundred Seventeen and 02/100 Dollars ($13,617.02), or any other sum, under or by virtue of said judgment on her behalf, save and except the sum of Ten Thousand Dollars ($10,000.00), from the principal sum of Twenty Thousand Dollars ($20,000.00) which defendant Standard Accident Insurance Company is obligated to pay under the terms of the policy in said complaint described.

IV.

In answer to Paragraph XII of said complaint, this answering defendant has no information or belief sufficient to enable him to answer to said paragraph or the allegations thereof, and [29] basing his denial on such ground, denies generally

and specifically each and every allegation in said paragraph contained, and the whole thereof; save and except that this answering defendant admits that defendant Standard Accident Insurance Company should be required to pay into court the total sum of Twenty Thousand Dollars ($20,000.00) due on said policy, together with interest at 7% per annum from the 30th day of March, 1950, and the costs of plaintiff and this answering defendant described in said two judgments. Further answering said paragraph and the allegations thereof, this answering defendant alleges that plaintiff and this answering defendant are each entitled to the sum of Ten Thousand Dollars ($10,000.00) from said principal sum of Twenty Thousand Dollars ($20,000.00).

Wherefore this answering defendant prays:

1. That defendant Standard Accident Insurance Company be ordered to pay into court the principal sum of Twenty Thousand Dollars ($20,000.00) due under the terms of said policy, together with interest thereon at the rate of 7% per annum from the 30th day of March, 1950, and that thereupon, out of said proceeds so paid into court, this court award to this answering defendant the sum of Ten Thousand Dollars ($10,000.00), together with interest thereon at the rate of 7% per annum from the 30th day of March, 1950, and that this court decree that plaintiff has no right, title or interest in said sum to be paid to this answering defendant.

2. That defendant Standard Accident Insurance Company be required to pay to this answering defendant his costs of suit incurred in action No. 35511 in said complaint referred to.

3. For his costs of suit herein incurred.

4. For such other and further relief as to the court may seem just in the premises.

JAMES C. HOLLINGSWORTH,

EDWARD HENDERSON,

By /s/ EDWARD HENDERSON,
Attorneys for Defendant,
Thomas B. Mack.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 14, 1950. [30]

[Title of District Court and Cause.]

PLAINTIFF'S MEMORANDUM PRIOR TO TRIAL

Pursuant to the provisions of Rule 12, U. S. District Court Rules, this memorandum is submitted for purposes of the trial set for March 26, 1951. That rule requires a brief statement of the facts of the case, all admissions and stipulations and a summary of the points of law involved with authorities. There are no stipulations on file pertinent to the trial, and this memorandum will be limited

therefore to statement of the facts, admissions and authorities.

Statement of Facts and Admissions

Vivian Winget, the plaintiff in this case, formerly Vivian Lee DeLozier, on the 31st day of March, 1950, recovered a judgment in the Superior Court of the State of California in and for the County of Ventura against one Billie Ray Towry for the sum of Thirty-two Thousand and no/100 ($32,000.00) Dollars with interest thereon [33] at seven (7) per cent per annum from the 30th day of March, 1950, together with costs of suit. The action was prosecuted upon a complaint which alleged generally that the plaintiff was riding as a guest in the vehicle of Towry and that, in one cause of action, said Towry was guilty of willful misconduct in the driving of his vehicle and, in a second cause of action, that Towry was driving while under the influence of intoxicating liquor. In the course of the trial of the case, the plaintiff moved to dismiss this second cause of action but, over the protests of counsel for the defendant Towry against such dismissal, the Court denied plaintiff's motion to dismiss the same.

In the same automobile accident, the defendant in this case, Thomas B. Mack, was injured and he filed a complaint for damages in the Superior Court of Ventura County also and his case and the case of the plaintiff were consolidated for trial. At the same time that plaintiff recovered judgment for Thirty-two Thousand and no/100 ($32,000.00) Dol-

lars as above set forth, said Thomas B. Mack recovered a judgment for Fifteen Thousand and no/100 ($15,000.00) Dollars with interest and costs.

At the time of the aforementioned accident, the said Towry had a policy of public liability insurance in force with the defendant in this case, Standard Accident Insurance Company, with limits of liability of Ten Thousand and no/100 ($10,000.00) Dollars for each person and Twenty Thousand and no/100 ($20,000.00) Dollars for each accident. A copy of such policy is attached to the answer of the defendant Standard Accident Insurance Company in this case.

Plaintiff in this case originally brought this action in the Superior Court of Ventura County, California, upon the theory that she is entitled to a pro rata share of the total judgments totaling Forty-seven Thousand and no/100 ($47,000.00) Dollars, entitled to recover such pro rata share out of the Twenty Thousand and no/100 ($20,000.00) Dollars limit of liability under said policy. At [34] the instance of defendant Standard Accident, the case was removed to this Court from the State Court. Both defendant Standard Accident and defendant Mack have admitted the allegations of the complaint numbered I, II, III, V and VI. Those paragraphs allege generally the identity of plaintiff and said two defendants, the fact that judgments were recovered on behalf of plaintiff and the defendant Mack as above set forth, and that said judgments were recovered by reason of the automobile accident above mentioned. Both of said

defendants admit that the policy above mentioned was in force and allege that it contained a provision limiting liability of the insurance company to Ten Thousand and no/100 ($10,000.00) Dollars for each person and Twenty Thousand and no/100 ($20,000.00) Dollars for each accident as more fully set forth in the policy. The defendant Mack admits that the assured Towry complied with all the provisions and conditions of the policy and that the policy was and continues to be since the 31st day of March, 1950, in full force and effect. The defendant Standard Accident denies this allegation.

The defendant Mack admits that Standard Accident is obligated to pay Twenty Thousand and no/100 ($20,000.00) Dollars together with interest and costs under the terms of said policy and that Standard Accident has refused to pay such sum or any portion thereof. Standard Accident admits such refusal and that the judgments are unsatisfied, but denies that it is obligated to pay anything under the terms of said policy.

Both defendants deny that plaintiff is entitled to recover the sum of Thirteen Thousand Six Hundred Seventeen and 02/100 ($13,617.02) Dollars out of the proceeds of said policy as the plaintiff's pro rata share thereof and the defendant Standard Accident denies that plaintiff is entitled to recover anything and the defendant Mack alleges plaintiff is entitled to recover only the sum of Ten Thousand and no/100 ($10,000.00) Dollars out of said policy.

Both defendants admit that the defendant Mack claims he is [35] entitled to Ten Thousand and

no/100 ($10,000.00) Dollars out of the proceeds of said policy.

In the prayer of his answer, the defendant Mack asks judgment that Twenty Thousand on no/100 ($20,000.00) Dollars be paid into Court by the defendant Standard Accident together with interest and costs and that the defendant Mack get Ten Thousand and no/100 ($10,000.00) Dollars of this amount plus interest and costs.

The defendant Standard Accident alleges as an affirmative defense that Towry, the assured, failed to cooperate as required by the policy and concealed evidence and made false and untrue statements to Standard Accident before the trial in Ventura Superior Court.

This leaves two main issues in the case, namely, did Towry cooperate with the insurance company within the meaning of the policy or did he not so that the insurance company can escape liability and secondly, is the plaintiff entitled to a pro rata share out of anything found due under the terms of the policy. [36]

Respectfully submitted,

/s/ NEIL D. HEILY,
Attorney for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 20, 1951. [44]

[Title of District Court and Cause.]

DEFENDANT'S MEMORANDUM PURSUANT TO LOCAL RULE 12

No. 12642-M

Statement of Facts

Each of the plaintiffs in the above cases consolidated for trial herein recovered a judgment in the Superior Court of the State of California, in and for the County of Ventura, against one Billy Ray Towry. The State Court actions had been consolidated for trial. These judgments were in favor of plaintiff Winget in the sum of Thirty-two Thousand Dollars ($32,000.00), and plaintiff Mack in the sum of Fifteen Thousand Dollars ($15,000.00), and were entered on or about March 31, 1950. [46]

At the time of the accident giving rise to the above actions, the said Towry was insured under a policy of automobile public liability insurance issued by this defendant and pertaining to the automobile then operated by him. A copy of said policy is attached to the answer of this defendant herein to the Winget complaint and to the complaint filed herein by plaintiff Mack.

This defendant by affirmative defense in each case alleges that the assured Towry, contrary to an express condition contained in his said policy, failed, neglected, and refused to assist in securing and giving evidence, and on the contrary, concealed evidence from this defendant and made false and untruthful statements to this defendant and in a sworn deposition intended for use upon the trial of said actions in the State Court.

Issues Raised by the Pleadings

The issues raised by the pleadings herein are:

1. Whether the insured Towry breached the conditions of his policy as to cooperation so as to prevent any recovery upon said policy for the accident in question, and

2. In the event the first issue should be decided in the negative, whether the plaintiff Winget must be limited to a recovery of the maximum sum of Ten Thousand Dollars ($10,000.00), plus interest and costs.

Admissions and Stipulations

In the statement of facts above are embraced in general the matters alleged in the complaints admitted by this defendant. No written stipulation as to other evidentiary matter has been made. [47]

Respectfully submitted,

FULCHER & WYNN,

By /s/ CAROL G. WYNN,
Attorneys for Standard Accident Insurance Company.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 21, 1951. [48]

[Title of District Court and Cause.]

VERDICT

We, the Jury in the above-entitled cause, find in favor of the plaintiff, Vivian Winget, and against the defendant, Standard Accident Insurance Company of Detroit, Michigan.

/s/ ROBERT J. BERNARD,
Foreman of the Jury.

Dated March 29, 1951, Los Angeles, California.

[Endorsed]: Filed March 29, 1951. [50]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action came on for trial before a jury in the above-entitled Court on the 27th day of March, 1951, Neil D. Heily appearing as attorney for plaintiff; Fulcher & Wynn, by Carol Wynn, appearing as attorneys for defendant Standard Accident Insurance Company of Detroit, Michigan (hereinafter referred to as "defendant Standard Accident"), and James C. Hollingsworth and Edward Henderson appearing as attorneys for Thomas B. Mack (hereinafter referred to as "defendant Mack"), the action having been dismissed as to the fictitious defendants and, in the course of the trial of said cause on the 27th day of March, 1951, the

defendant Mack and the defendant Standard Accident having entered into a stipulation for judgment in the sum of Six Thousand and no/100 ($6,000.00) Dollars in favor of defendant Mack and against defendant Standard Accident and the Court having approved such stipulation for entry of such judgment over the objection by counsel for the plaintiff, the defendant Mack thereupon [51] withdrew from further participation as a party in the trial of said cause and the trial of said cause having proceeded with only the plaintiff and the defendant Standard Accident as parties therein and the jury having returned a verdict on the only issue submitted to it, to wit, the issue as to whether the assured in the policy hereinafter referred to had cooperated with the defendant Standard Accident, the insuring company, under the terms of said policy, and said verdict having been in favor of the plaintiff and against the defendant Standard Accident, the Court now makes its findings of fact and conclusions of law with reference to the issues not so submitted to said jury as follows:

Findings of Fact

I.

The Court finds that the defendant Standard Accident has admitted the allegations contained in Paragraphs I, II, III, V and VI of the complaint on file herein and therefore that said allegations are true.

II.

The Court further finds that at the time and

place of the accident referred to in the admitted paragraphs of the complaint on file herein as hereinabove specified there was in full force and effect a certain automobile bodily injury liability policy No. J894065 issued by the defendant Standard Accident to one Billy Ray Towry, also known as Billy Towry, under the terms of which policy the defendant Standard Accident agreed to pay on behalf of said Billy Towry all sums which he might become obligated to pay by reason of liability imposed upon him by law for damages because of bodily injury sustained by any person or persons caused by accident and arising out of the ownership, maintenance or use of the vehicle involved in said accident up to the limit of Twenty Thousand and no/100 ($20,000.00) Dollars for such accident, said policy being what is known as a 10-20 policy, that is, having as a coverage for bodily injury liability Ten [52] Thousand and no/100 ($10,000.00) Dollars for each person and Twenty Thousand and no/100 ($20,000.00) Dollars for each accident.

III.

That under condition No. 8 of said policy it was provided therein as follows:

> "The insured shall cooperate with the company and, upon the company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. The insured shall not, except at his own cost, voluntarily make

any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of accident."

That the issue as to whether said Billy Towry had cooperated with the defendant Standard Accident under the provisions of said clause in said policy was submitted to the jury in the above-entitled cause and the jury determined that said Billy Towry had cooperated with the defendant Standard Accident as required by said clause by finding in favor of the plaintiff and against the defendant Standard Accident.

IV.

That said policy of insurance was in full force and effect and had been complied with by the assured Billy Towry at the time of the rendition of the judgment referred to in the admitted paragraphs of the complaint on file herein as hereinabove specified, and that under the terms of said policy the defendant Standard Accident agreed to pay the total sum of Twenty Thousand and no/100 ($20,000.00) Dollars damages arising out of bodily injury sustained by two or more persons in such accident and in partial satisfaction of the judgment in favor of the plaintiff in the sum of Thirty-two Thousand and no/100 ($32,000.00) Dollars and in partial satisfaction of the judgment in [53] favor of the defendant Mack in the sum of Fifteen Thousand and no/100 ($15,000.00) Dollars.

V.

That Paragraph I of the "Conditions" of said policy reads as follows:

> "The limit of bodily injury liability stated in the declarations as applicable to 'each person' is the limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury, including death at any time resulting therefrom, sustained by one person in any one accident; the limit of such liability stated in the declarations as applicable to 'each accident' is, subject to the above provisions respecting each person, the total limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury, including death at any time resulting therefrom, sustained by two or more persons in any one accident."

VI.

That in the course of the trial of said cause, the Court granted the motion of the plaintiff to amend her complaint to conform to the proof by inserting therein a prayer for interest at seven (7) per cent per annum from the 30th day of March, 1950, on the total sum of Thirty-two Thousand and no/100 ($32,000.00) Dollars, the principal sum of the judgment obtained by said plaintiff against said Billy Towry. That Paragraph II of the "insuring agreements" contained in said policy reads as follows:

> "As respects such insurance as is afforded

by the other terms of this policy under coverage A the company shall [54]

"(a) defend in his name and behalf any suit against the insured alleging such injury or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the company shall have the right to make such investigation, negotiation and settlement of any claim or suit as may be deemed expedient by the company;

"(b) pay all premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of the policy, all premiums on appeal bonds required in any such defended suit, but without any obligation to apply for or furnish such bonds, all costs taxed against the insured in any such suit, all expenses incurred by the company, all interest accruing after entry of judgment until the company has paid, tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon, and expenses incurred by the insured in the event of bodily injury, for such immediate medical and surgical relief to others as shall be imperative at the time of accident;

"(c) reimburse the insured for all reasonable expenses, other than loss of earnings, incurred at the company's request.

"The company agrees to pay the amounts incurred under this insuring agreement, except settlements of claims and suits, in addition to

the applicable limit of [55] liability of this policy."

VII.

That all allegations in the pleadings on file herein inconsistent with the foregoing are untrue.

Conclusions of Law

From the foregoing findings of fact, the Court concludes that the plaintiff is entitled to judgment against the defendant Standard Accident in the sum of Ten Thousand and no/100 ($10,000.00) Dollars plus costs in State Court of $97.80, together with interest on the whole sum of $10,097.80 at the rate of seven (7) per cent per annum from the 30th day of March, 1950, and her costs of suit, and that plaintiff is not entitled to a pro rata share of the total sum of Twenty Thousand and no/100 ($20,000.00) Dollars payable under said policy of insurance and is not entitled to interest on the total sum of Thirty-two Thousand and no/100 ($32,000.00) Dollars, the amount of her judgment against the said Billy Towry, but is only entitled to interest on the said sum of Ten Thousand and no/100 ($10,000.00) Dollars as above set forth.

Let judgment be entered accordingly.

Dated this 30th day of April, 1951.

/s/ HARRY C. WESTOVER,
Judge.

Judgment entered May 2, 1951.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 1, 1951. [56]

In the District Court of the United States, Southern District of California, Central Division

No. 12327-HW

VIVIAN WINGET,

Plaintiff,

vs.

STANDARD ACCIDENT INSURANCE COMPANY OF DETROIT, MICHIGAN, a Corporation; THOMAS B. MACK, etc.,

Defendants.

JUDGMENT

The above-entitled action came on for trial on the 27th day of March, 1951, in the above-entitled Court before a jury, Neil D. Heily appearing as attorney for plaintiff; Fulcher & Wynn, by Carol Wynn, appearing as attorneys for defendant Standard Accident Insurance Company of Detroit, and James C. Hollingsworth and Edward Henderson appearing as attorneys for defendant Thomas B. Mack and, in the course of the trial of said cause, the defendant Mack and the defendant Standard Accident having entered into a stipulation for a judgment in favor of the defendant Mack in the sum of Six Thousand and no/100 ($6,000.00) Dollars and against the defendant Standard Accident and the defendant Mack having thereupon withdrawn from further trial in the case as a party thereto and trial having proceeded with plaintiff and defendant Standard Accident as the only parties, and

the jury having rendered a verdict in favor of the plaintiff and against the [58] defendant Standard Accident on the only issue submitted to it and the Court having made its findings of fact and conclusions of law herein as to the legal issues involved in the case,

It Is Hereby Ordered, Adjudged and Decreed, that the plaintiff do have and recover judgment against the defendant Standard Accident Insurance Company of Detroit in the sum of Ten Thousand Ninety-seven and eighty/100 ($10,097.80) Dollars together with interest thereon at the rate of seven (7) per cent per annum from the 30th day of March, 1950, and together with plaintiff's costs incurred and hereby fixed at the sum of $131.85.

Dated this 30th day of April, 1951.

/s/ HARRY C. WESTOVER,
Judge.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 1, 1951. [59]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Above-Entitled Court and to the Clerk Thereof; to the Plaintiff Vivian Winget, and to Neil D. Heily, Her Attorney; and to the Defendant Thomas B. Mack, and to Edward Henderson and James C. Hollingsworth, His Attorneys:

Notice Is Hereby Given that Standard Accident Insurance Company of Detroit, Michigan, a corporation, one of the defendants above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment entered in this action on May 2, 1951, in Book 72 of Judgments, at page 285 thereof, and from the whole of said judgment.

FULCHER & WYNN,

By /s/ CAROL G. WYNN,

Attorneys for Defendant Standard Accident Insurance Company.

[Endorsed]: Filed May 29, 1951. [61]

[Title of District Court and Cause.]

NOTICE OF APPEAL FROM PART OF JUDGMENT

To the Clerk of the Above-Entitled Court, Defendants Standard Accident Insurance Company of Detroit, and Fulcher & Wynn, Their Attorneys, and Defendant Thomas B. Mack and James C. Hollingsworth & Edward Henderson, His Attorneys:

You and each of you will please take notice that the above-named plaintiff Vivian Winget appeals to the United States Court of Appeals for the Ninth Circuit from the following part of that certain judgment rendered in the above-entitled Court in

the above-entitled cause on the 2nd day of May, 1951, in favor of the above-named plaintiff Vivian Winget and against the above-named defendant Standard Accident Insurance Company of Detroit, to wit: That portion of said judgment which fails to award to said plaintiff the sum of Three Thousand Six Hundred Seventeen and 02/100 ($3,617.02) Dollars in addition to the sum of Ten Thousand Ninety-seven and 80/100 ($10,097.80) Dollars awarded by said judgment; and from that portion of said judgment which fails to award to said plaintiff interest at seven (7) per cent per annum from the 30th day of March, 1950, on the sum of Twenty-two Thousand and no/100 ($22,000.00) Dollars. [62]

Dated this 29th day of May, 1951.

/s/ NEIL D. HEILY,
Attorney for Plaintiff,
Vivian Winget.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 31, 1951. [63]

In the United States District Court, Southern District of California, Central Division

Honorable Harry C. Westover, Judge Presiding

No. 12327-HW

VIVIAN WINGET,

Plaintiff,

vs.

STANDARD ACCIDENT INSURANCE COMPANY OF DETROIT, MICHIGAN, a Corporation, THOMAS B. MACK, et al.,

Defendants.

No. 12642-HW

THOMAS B. MACK,

Plaintiff,

vs.

STANDARD ACCIDENT INSURANCE COMPANY OF DETROIT, MICHIGAN, a Corporation, et al.,

Defendants.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Appearances:

For the Plaintiff Vivian Winget:

NEIL D. HEILY, ESQ.

For Plaintiff and Defendant Mack:

JAMES C. HOLLINGSWORTH, ESQ.,
EDWARD HENDERSON, ESQ.

For the Defendant Standard Accident Insurance Company:

FULCHER & WYNN, by
CAROL G. WYNN, ESQ.

March 27, 1951—10:00 A.M.

The Clerk: Consolidated cases, Nos. 12327-HW and 12642-HW, Vivian Winget vs. Standard Accident Insurance Company of Detroit, Michigan, a corporation, et al., and Thomas B. Mack vs. Standard Accident Insurance Company, a corporation, et al., for consolidated jury trial.

Mr. Heily: Ready for the plaintiff Winget.

Mr. Hollingsworth: Ready for the plaintiff Mack.

Mr. Wynn: Ready for the defendant.

The Court: You may proceed.

(A jury was duly impaneled.)

The Court: Would you like to make an opening statement?

Mr. Heily: I believe in the interest of chronology and keeping the jurors from being confused, it would be best.

The Court: All right, you can make a statement.

(Opening statement of Mr. Heily.)

(Opening statement of Mr. Hollingsworth.)

(Opening statement of Mr. Wynn.)

The Court: Call your first witness.

Mr. Heily: If the court please, counsel for the defense and plaintiffs have been discussing the matter of the burden of proof of non-cooperation. I believe it will be stipulated that the burden of proof is upon the defendant [4*] Standard Accident Insurance Company to show non-cooperation. Therefore, in order to shorten these proceedings as much as possible, the fact that the judgments were entered for $15,000 in favor of Mack, the fact that the judgment was entered in favor of the plaintiff Winget for $32,000 is admitted in the pleadings. For the purpose of getting it to the jury, I believe it will be stipulated that those two judgments were entered March 30, 1950, in favor of those two plaintiffs and against the defendant Towery. Is it so stipulated?

Mr. Wynn: We so stipulate.

The Court: Such may be the stipulation.

Mr. Heily: Will you instruct the jury now, your Honor, that is a matter to be taken as evidence? Then the plaintiffs will rest.

The Court: Ladies and gentlemen of the jury, during the trial of this case if the parties stipulate as to a fact, you can accept that stipulation the same as if the witnesses appeared here and testified to it. There is no controversy in this case, evidently,

*** Page numbering appearing at top of page of original Reporter's Transcript of Record.**

of the fact that a judgment was rendered in favor of the plaintiffs, there is no controversy about the judgment. The only issue in this case, evidently, seems to be the question of whether or not the insurance company is liable.

Mr. Hollingsworth: In the case of the plaintiff, Thomas [5] B. Mack, the general stipulation will apply. I have here an exemplified copy of the judgment in the State Court and I presume there will be no objection to offering it and having it received in evidence on behalf of the plaintiff Thomas B. Mack.

Mr. Wynn: No objection.

The Court: It may be received.

The Clerk: Plaintiff Mack's Exhibit No. 1.

(The document referred to was received in evidence and marked Plaintiff Mack's Exhibit No. 1.)

The Court: I assume that the burden of proof is now on the defendant in this case.

Mr. Wynn: There are several preliminary matters, if the court please. We have under subpoena present in the courtroom Miss Kay Dawson, notary public and official reporter in the County of Ventura, who is prepared to testify as to a transcript I hold of questions and answers taken before her on February 28, I believe it was, 1950. Counsel have examined this statement, and I think are prepared to stipulate she would so testify if called, so that I may introduce the transcript in evidence at the proper time.

The Court: Is there any objection to the introduction of the transcript?

Mr. Hollingsworth: No, your Honor. We know Miss Dawson and we have no objection to it. [6]

The Court: It may be introduced now, if you want, and it may be marked as Exhibit A.

Mr. Heily: I have no objection. However, I would like to ask the witness Miss Dawson a few questions regarding the place and time of taking.

Mr. Wynn: My only purpose was to permit her to leave.

The Court: The transcript may be introduced and marked Defendant's Exhibit A.

The Clerk: So marked.

(The document referred to was received in evidence and marked Defendant's Exhibit A.)

The Court: Now, if you want the witness to be excused, I assume you should allow her to be placed upon the stand so she can be questioned and then she can be excused. Otherwise you will have to keep her here until some time later.

Mr. Wynn: One other preliminary matter, if the court please. Also under subpoena is Walter J. Fourt, who is now a Superior Court judge of Ventura County. Judge Fourt called me after being served with the subpoena and explained that it would be extremely embarrassing to the Superior Court of Ventura were he to spend a day or so in Los Angeles, and I suggested conferring with my good friends, counsel for the plaintiffs, and the submission by Judge Fourt of a statement as

to what his testimony would be if called. I hold that affidavit and I understand counsel is willing to stipulate that it may [7] be introduced in evidence as the testimony of Judge Fourt.

Mr. Hollingsworth: No objection.

Mr. Heily: No objection.

The Court: And read to the jury?

Mr. Wynn: And read to the jury.

The Court: Such may be the order. It may be marked as Exhibit B.

The Clerk: So marked.

(The document referred to was received in evidence and marked Defendant's Exhibit B.)

Mr. Wynn: Miss Dawson.

KAY H. DAWSON

called as a witness on behalf of the defendant Standard Accident Insurance Company, having been first duly sworn, was examined and testified as follows:

The Clerk: Be seated, please, and state your name.

The Witness: Kay H. Dawson.

The Court: Miss Dawson, I am going to ask you to speak louder so the jury can hear you, and the lawyers, too.

The Witness: All right, your Honor.

Direct Examination

By Mr. Wynn:

Q. Miss Dawson, if you can make me hear back

(Testimony of Kay H. Dawson.)

here, I [8] am sure every person on the jury can hear. What is your business or occupation?

A. Public stenographer and notary public.

Q. How long have you been so engaged?

A. About seven and one-half years.

Q. In the City of Ventura, California?

A. Yes.

Q. During that period of time? A. Yes.

Q. Directing your attention to February 28, 1950, did you have occasion on that date to take a written statement of a Billy Ray Towery?

A. I did.

Q. Where was that statement taken?

A. In the court reporter's office at the Court House, Ventura.

Q. Who was present at that time?

A. Mr. Ellerby, Mr. Towery, and myself.

Q. Prior to the statement from Mr. Towery, was he sworn by you? A. I believe so.

Q. At that time were certain questions asked him by Mr. Ellerby? A. That's right.

Q. And certain answers given by him? [9]

A. That is correct.

Q. Did you report in shorthand or otherwise in notes the questions asked and the answers given?

A. I did.

Q. Subsequently, did you transcribe from those notes a writing? A. I did.

Q. I show you Defendant's Exhibit A, which has been admitted in evidence, and ask you if this is the transcript of your notes taken at the time?

(Testimony of Kay H. Dawson.)

A. It is.

Q. The last page bears a signature, Kay Dawson, does it?

A. That is correct, and that is my notary seal.

Mr. Wynn: May I have permission to read this document to the jury?

The Court: Yes.

Mr. Wynn: I am reading Defendant's Exhibit A, which has been admitted in this cause. It is entitled Reporting of Deposition of Billy Ray Towery, February 28, 1950, Ventura, California. Re Accident January 26, 1949, Vivian Lee Delozier, et al., vs. Thomas B. Mack, vs. Billy Ray Towery.

Appearing on the first sheet is also H. T. Ellerby, Claims Supervisor, Cass & Johansing, Automobile Club of Southern California, 2601 South Figueroa Street, Los [10] Angeles, California. Reported by: Kay Dawson.

Mr. Hollingsworth: May it please the court, before Mr. Wynn reads the deposition or statement, whatever you call it, to the jury and the court, we desire on behalf of Thomas B. Mack to interpose an objection to this particular statement upon the ground that insofar as the plaintiff Thomas B. Mack is concerned, it is purely irrelevant and immaterial, because we tendered no issue in the case of Mack against Towery as to the question of intoxication, and insofar as he is concerned, it has no bearing upon the merits of this case whatsoever. We object to it on the ground it is irrelevant and immaterial insofar as Thomas B. Mack is concerned.

(Testimony of Kay H. Dawson.)

The Court: Overruled.

Mr. Wynn: "Sworn statement of Billy Ray Towery. Witness sworn by notary, Kay Dawson.

"Q. You are Billy Ray Towery?

"A. Yes, sir.

"Q. Do you recall that on October 28, 1949, your deposition was taken in the case of Vivian Lee Delozier, et al., vs. Thomas B. Mack, vs. Billy Ray Towry, by Mr. Hollingsworth and Mr. Heily—do you remember that?

"A. Yes.

"Q. And that deposition was taken in connection with two law suits that arise out of an [11] accident? A. Yes.

"Q. That accident occurred on January 26, 1949—is that right? A. Yes, sir.

"Q. Do you remember that the date of the accident occurred on January 26, 1949?

"A. Yes, sir, that is the date.

"Q. In any event that was the accident in which Delozier and Mr. Mack were injured while riding in your automobile?

"A. Yes, that is the date.

"Q. Mr. Hollingsworth asked you at that time, the following question: 'Did you drink on that day' meaning January 26, 1949, the date of the accident. You answered 'No.' Is that true or false? Is that answer correct?

"A. No, the answer is false. I did have something to drink that day.

"Q. He then asked you this question: 'Did

(Testimony of Kay H. Dawson.)

you drink anything on that day' and the answer was 'No.' Is that answer true or false?

"A. The answer is false. I did drink on that day.

"Q. I assume the next question was 'all [12] day long' and you answered 'All day long.' Was your answer true or false?

"A. Well, sir, all day long. I had an occasional beer.

"Q. The next question is: He asked, 'Any intoxicating liquor' and you answered 'No.' Is that true or false? A. False.

"Q. The next question 'Of any kind?' And you answered 'No.' Is that answer true or false? A. False.

"Q. Then the next question: 'You didn't stop at any place where they sell it' and your answer was 'No.' Is that true or false?

"A. That day I did. Yes, I stopped at a place that sold it.

"Q. Then the question: 'You didn't go into any bar room?' And your answer was 'No.' Was that true or false? A. False.

"Q. Then the question: 'Or any cocktail bar?' And your answer is 'No.' Was that true or false? A. False.

"Q. Question: 'You didn't have any [13] liquor in your possession?' And your answer was 'No.' Is that true or false?

"A. I did have liquor in my possession.

(Testimony of Kay H. Dawson.)

"Q. Then the next question was: 'On your person? And you answered 'No.' Was that true or false? A. I had beer.

"Q. Then the next question was: 'You didn't take anything to drink all day long?' And your answer was: 'No.' Is that true or false?

"A. False.

"Q. Then the next question: 'What time of day did this accident happen?' Your answer was: 'The accident happened about 5 that afternoon, I guess.' Was that true or false?

"A. False to the best of my knowledge.

"Q. Question: 'Did you have any beer that day?' Your answer: 'No.' Was that true or false? A. False.

"Q. Then his next question: 'Or any other intoxicants of any kind?' You answered 'No.' Was that true or false? A. True.

"Q. All you had that day was beer—is that [14] right? A. Yes, sir.

"Mr. Ellerby: Then Mr. Heily asked you the following questions:

"Q. Did you go anywhere else than just to the home at the beach?"

(Forget that one) to reporter.

"Q. Question: 'Did you at any time that day go into the U & I Cafe?' Your answer was 'No.' Is that true or false? A. False.

"Q. Then the next question. 'Did you at any time have a drink of beer?' The answer by you was 'No.' Is that true or false?

(Testimony of Kay H. Dawson.)

"A. False.

"Q. The next question: 'Did you at any time that day go to Zeilger's Cafe?' Your answer was 'No.' Was that true or false?

"A. False.

"Q. Question: 'Did you have a glass of beer in Zeilger's Cafe that day?' Your answer was 'no.' Was that true or false? A. False.

"Q. That is all."

The Court: I wonder if for the purpose of the record [15] we could have a stipulation. When was the date of the original deposition?

Mr. Wynn: October 28, 1949.

Mr. Heily: Yes, that is correct.

The Court: October 28, 1949?

Mr. Heily: October 28.

The Court: What is the date of that statement?

Mr. Wynn: February 28, 1950.

The Court: February what?

Mr. Wynn: February 28, 1950.

The Court: And what was the date of trial?

Mr. Hollingsworth: I am quite sure, your Honor, it started on the 28th of March and finished on the 30th. The judgment was rendered on the 30th, as appears from Plaintiff Mack's Exhibit 1. I am sure it started on the 28th of March, subject to correction. That date might be subject to correction. But I am quite sure it took three days to try.

Mr. Wynn: The Superior Court files of Ventura County are under subpoena and here in the courtroom.

(Testimony of Kay H. Dawson.)

The Court: That's all right. We can change it if necessary.

Mr. Hollingsworth: Either the 27th or the 28th, your Honor.

The Court: These dates may be important and I want to be sure there will be no question. It can be stipulated that [16] the original deposition was taken on or about October 28, 1949, and the statement that was just read was taken on or about February 28, 1950, and the trial commenced on or about March 28, 1950.

Mr. Hollingsworth: I would say March 27, your Honor.

The Court: March 27th?

Mr. Hollingsworth: Yes. I think the motion was made the week before in the trial court, and the case started a week later. I think we started on Monday, March 27th.

Mr. Wynn: No further questions of this witness.

Cross-Examination

By Mr. Heily:

Q. Miss Dawson, at whose request did you take this statement?

A. I had a call from the office of the court reporter. All the reporters were busy in court.

Q. Who paid you for your services?

A. Mr. Ellerby of Cass & Johansing.

Q. The insurance agent?

A. I think he is the claims supervisor.

(Testimony of Kay H. Dawson.)

Q. He was the one who talked to you to get you to come up to the court reporter's office?

A. No. I had a call from the office itself. Whether it was Mr. Van Vleck, I don't remember. [17]

Q. In any event, you were paid by Cass & Johansing? A. That is correct.

Q. When you arrived at the scene where the statement was to be taken, is that the first time you saw Mr. Towry and Mr. Ellerby?

A. That is correct.

Q. Where were they?

A. They were sitting in the court reporter's office across from a double desk.

Q. You did not go into the room with them? They were there when you arrived?

A. They were there when I arrived.

Q. Were they talking as you entered?

A. I couldn't say for sure, but I believe they were.

Q. No one else was present? A. No.

Q. In the course of the taking of this statement, do you recall anything being said to you by Mr. Ellerby to this effect, "Omit that," or "Leave that off the record," or "This is off the record"?

A. Just that one statement that is in the record.

Q. Just the one statement?

A. Just the one statement.

Q. During the time you were preparing to take the statement, did you hear Mr. Ellerby tell Mr. Towry, "Just say [18] whether the question is true or false. Don't elaborate."

(Testimony of Kay H. Dawson.)

A. I don't recall that, but I do remember that the whole testimony seemed to be either "True" or "False."

Q. In other words, you don't recall Mr. Ellerby saying, "Don't explain your answer. Just answer true or false."

A. No, I don't honestly. That is quite a while ago.

Q. He might have said that and he might not and you wouldn't recall?

A. I wouldn't know, myself.

Mr. Heily: That's all.

Mr. Hollingsworth: We have no questions.

Mr. Wynn: May the witness be excused?

Mr. Hollingsworth: As far as I am concerned, she may.

Mr. Heily: Yes.

The Court: You may be excused.

The Witness: Thank you, your Honor.

(Witness excused.)

The Court: I understand from the testimony that none of the attorneys for the plaintiffs in this action was present at the time this statement was taken.

Mr. Wynn: No, they were not.

Mr. Hollingsworth: That is correct, your Honor. We were not notified and we were not present and knew nothing about it at the time it was taken. [19]

Mr. Wynn: I have subpoenaed and they are here in the courtroom, I understand, the original

files in these actions in the Ventura County Superior Court, which contain the original deposition of Mr. Towry taken on October 28, 1949. I have what appears to be a carbon copy of such a deposition and I think that counsel——

Mr. Hollingsworth: I have got an exemplified copy here, if it will help you out, showing the corrections that were made in detail, and if you want to use that or use yours, I have no objection.

Mr. Wynn: Mr. Hollingsworth has offered this, and I now offer it in evidence.

The Court: It may be received and marked Exhibit C.

The Clerk: So marked.

(The document referred to was received in evidence and marked Defendant's Exhibit C.)

Mr. Hollingsworth: It will be understood, your Honor, I suppose, to protect our record, anything relative to intoxication, as far as Mr. Mack is concerned, goes in over our general objection and it is immaterial and irrelevant.

The Court: You can have a general objection as to intoxication as far as your client is concerned, and there will be the same ruling.

Mr. Wynn: May I have your Honor's permission to read certain portions of this deposition to the jury at this time, [20] which I will specify by page and line?

The Court: If there is no objection, you can read certain portions.

Mr. Hollingsworth: No objection on our part to that method, if he wants to pursue it.

The Court: You may do that, then.

Mr. Wynn: I will read from the deposition of Billy Ray Towry taken in the actions of Vivian Lee Delozier, a minor, by Lawrence E. Delozier, her guardian ad litem, plaintiff, vs. Billy Ray Towry, etc., defendants, and Thomas B. Mack, plaintiff, vs. Billy Ray Towry, etc., defendants, Superior Court of Ventura County, before Cecil Van Vleck, notary public, in the office of James C. Hollingsworth, on the 28th day of October, 1949. Reading from page——

The Court: Maybe before you read, you should stipulate as to who was present. You said it was taken in Mr. Hollingsworth's office. I think you should stipulate who was there.

Mr. Wynn: May it be stipulated counsel present on behalf of the plaintiff Delozier was Mr. Neil D. Heily; present on behalf of the defendant Thomas B. Mack were Edward Henderson and James C. Hollingsworth; present for the defendants were the firm of Bauder, Gilbert, Thompson, Kelly and Veatch, by Wayne Veatch.

Mr. Hollingsworth: It may be so [21] stipulated.

Mr. Heily: So stipulated.

Mr. Wynn: Reading from page 7, beginning on line 11, question asked by Mr. Hollingsworth:

"Q. Did he do any drinking during that interval? A. No.

"Q. Nothing of an intoxicating nature to drink? A. No.

"Q. Neither one of you? A. No."

Then a question was asked to which an objection was interposed.

Mr. Hollingsworth: What page is this?

Mr. Wynn: Page 7.

Mr. Heily: I think you should continue reading that.

Mr. Wynn: I have no objection.

"Q. Did you drink?

"Mr. Veatch: To which we object as incompetent, irrelevant and immaterial.

"Mr. Hollingsworth: It is purely preliminary.

"Mr. Veatch: I have no objection to your asking whether he drank on this day, but whether he did before or since is entirely irrelevant.

"Mr. Hollingsworth: Well, you have got your [22] objection.

"Mr. Veatch: I was just registering it. He can answer subject to the objection.

"Mr. Hollingsworth: What I want is just the truth.

"Q. Did you drink? A. Yes, I drink.

"Q. Did you drink on that day?

"A. No."

Then in handwriting appears the following in pen and ink, "except for some beer."

The Court: Before you proceed, can you stipu-

late as to when that handwriting was written into the deposition?

Mr. Wynn: The affidavit submitted by Judge Fourt, your Honor, fixes the time at which these changes were made and the deposition signed and sworn to as some time in the latter part of March, 1950.

The Court: Does that apply to all the changes that were made in the deposition?

Mr. Hollingsworth: Yes, your Honor. The changes that we think will be evident prove that these depositions were corrected at least a week or longer prior to the commencement of the trial, in the office of the attorneys who were representing Mr. Towry at that time, in addition to the firm of Bauder, Veatch, Kelly, Thompson, etc. I think that it will [23] show that it was at least a week, if not longer, prior to the date of trial that these corrections were made.

The Court: For my information, and the information of the jury, as a general rule, when the deposition is taken, the party comes in before a notary public, is sworn, and gives testimony, which is taken down in shorthand. Subsequent to that time, the shorthand reporter transcribes it. Then that deposition is presented to the party for his signature. At that time, if I understand correctly, the party who is given the deposition can change his answers.

Now, can you tell me or can you stipulate that the changes were made before it was signed, or were they made after it was signed?

Mr. Hollingsworth: Well, we have the attorney who represented Mr. Towry at that time, and I think we can stipulate the corrections were made before it was signed.

Mr. Wynn: I can't so stipulate in that Judge Fourt, on whom I must rely exclusively as the notary before whom it was signed, has advised that the deposition was subscribed and sworn to before him as a notary public in March, 1950. That is significant in that the deposition itself bears the following:

"Subscribed and sworn to before me this....day of...., 1949. Walter J. Fourt."

Judge Fourt states that: "Some time in [24] March, 1950, the exact date of which I do not now remember, Robert R. Willard, a practicing attorney in Ventura, brought a man to my office and introduced him to me as Billie Ray Towry. Mr. Willard stated to me that Billie Ray Towry had made corrections in a deposition and desired to subscribe and swear to the deposition as corrected. Mr. Willard requested that I certify to Mr. Towry's signature and oath. I thereupon witnessed Mr. Towry's subscription of the deposition and took his oath to the deposition, whereupon I affixed my signature and notarial seal.

"This subscription and certificate were made outside of regular office hours and my secretary was not in the office. On notarial matters brought to me by Robert R. Willard at this general period of time dates were ordinarily filled in and completed by Mr. Willard or my secretary. I did not notice

that the day and month of this particular certificate were not filled in or that the year of 1949, as typed, was incorrect. As indicated above, this corrected deposition was subscribed and sworn to before me as a notary public some time in March, 1950.

"That at or about the time of the signing of the said deposition by Billie Ray Towry I stated in substance to him that in my opinion he was doing the proper thing to state the truth of the matter."

The Court: I take it from what you say, that you can't [25] stipulate that the changes in the deposition were made before it was signed.

Mr. Hollingsworth: That is what this affidavit indicates, your Honor, because it says here, "As indicated above, this corrected deposition was subscribed and sworn to before me as a notary public some time in March, 1950." I think it is very plain on its face that it was corrected before it was signed. I think he is bound by his own exhibit.

The Court: If you can't stipulate, you can probably have some evidence presented as to whether or not it was changed before it was signed. Evidently you can't enter into a stipulation.

Mr. Hollingsworth: Apparently not.

Mr. Wynn: No. May I ask the reporter to read the last question and answer from the deposition?

(The record was read by the reporter, as follows: "Q. Did you drink on that day?

"A. No.")

Mr. Wynn: Corrected to read, "No, except for some beer."

"Q. All day long? A. All day long.

"Q. No intoxicating liquor? A. No."

Corrected to read, "No, except for some [26] beer."

"Q. Of any kind? A. No."

Corrected to read, "No, except beer."

"Q. You didn't stop any place where they sell it? A. No."

Corrected to read, "No, except where they sell beer and food in cafes."

"Q. You didn't go into any barroom?

"A. No.

"Q. Or cocktail bar? A. No.

"Q. Lounges? A. No.

"Q. You didn't have any liquor in your possession? A. No."

Corrected to read, "No. No hard liquor. We had two small bottles of beer in the car."

"Q. You didn't take a drink all day long?

"A. No."

Corrected to read, "No. No hard liquor, just some beer."

"Q. What time did this accident happen?

"A. The accident happened about 5:00 o'clock that afternoon, I guess. [27]

"Q. Had you had any beer that day?

"A. No."

That is corrected to read, "Yes."

"Q. Or any other intoxicant of any kind?
"A. No.
"Q. Not a thing? A. No."

Corrected to read, "No. Except for beer."

Reading from page 15 of the same deposition, questioning by Mr. Hollingsworth, beginning on line 21:

"Q. Did you do any drinking there?
"A. No."

Corrected to read, "No. No hard liquor."

"Q. You didn't drink any beer?
"A. No."

Corrected to read, "No. I had one small bottle." of beer."

"Q. Nobody else did? A. No."

Corrected to read, "Yes. Tommy and I drank a small bottle of beer each."

"Q. Everybody was cold sober?
"A. Yes.
"Q. You didn't see Mack have anything to drink? A. No." [28]

Corrected to read, "No, except for the beer I have mentioned."

"Q. You didn't take any of any kind?
"A. No."

Corrected to read, "No. No hard liquor, just beer."

Then reading from page 21, the examination of Mr. Billy Ray Towry, beginning line 18:

"Q. And your driving was not influenced by anything that you had had to drink?

"A. No.

"Q. Had you been in any cocktail bars before taking that trip that afternoon?

"A. No."

Shal I call my next witness, your Honor?

The Court: Yes, call the witness.

Mr. Wynn: Mr. Medlen.

JOHN WILLIAM MEDLEN

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Be seated, please, and state your name.

The Witness: John William Medlen. [29]

Direct Examination

By Mr. Wynn:

Q. What is your business, Mr. Medlen?

A. Claims adjuster.

Q. By whom are you employed?

A. Cass & Johansing.

Q. Were you so employed in 1949 and 1950?

A. I was.

Q. What is the address of your place of business?

(Testimony of John William Medlen.)

A. 1301 Santa Barbara Street, Santa Barbara, California.

Q. Are you acquainted with Billy Ray Towry?

A. I am.

Q. Is he present in the courtroom at the present time? A. He is.

Q. When did you first meet Mr. Towry?

A. I am not certain of the date, but I believe it was approximately two weeks following his accident of January, 1949.

Q. Where did you meet him?

A. I am not certain of that either, but I believe it was in the Auto Club in Ventura.

Q. At the time you first met Mr. Towry, had you been advised by him or on his behalf as to the occurrences of [30] the accident? A. I was.

Q. How were you advised?

A. By means of a form report that was taken by the Auto Club adjuster in Ventura and it was mailed to me in Santa Barbara.

Q. Did the form report which you received purport to have been signed by Mr. Towry?

A. Yes, it did.

Mr. Heily: Objected to as incompetent, irrelevant and immaterial and not the best evidence.

Mr. Wynn: I am laying the foundation for the evidence, if the court please.

The Court: Let's have the question.

(The question was read by the reporter.)

(Testimony of John William Medlen.)

The Court: Just answer it yes or no.

The Witness: Yes.

Q. (By Mr. Wynn): I show you a printed sheet entitled "Assured's report," bearing typing on both the front and reverse sides, and bearing the signature "Billy R. Towry."

Is this the report to which you have referred?

A. Yes, it is.

Q. Do you know the signature of Mr. Towry?

A. No, I doubt that I could identify it now unless I had this. [31]

Mr. Wynn: We offer this for identification, if the court please.

The Court: It may be received for identification only.

Mr. Wynn: May I ask one further question?

The Court: Yes.

Q. (By Mr. Wynn): Was all of the typing appearing on this document on it when you first received it?

A. To the best of my knowledge, it was.

The Court: That will be marked as Defendant's Exhibit D for identification.

(The document referred to was marked Defendant's Exhibit D for identification.)

Q. (By Mr. Wynn): Did you state that shortly after the receipt of this document marked Defendant's Exhibit D for identification you had a meeting with Mr. Towry?

A. I don't believe it was an arranged meeting.

(Testimony of John William Medlen.)

I happened to be in the Ventura office, and I believe it was at that time he also happened to be in there.

Q. About what date was that?

A. I would say that was approximately two weeks following the accident.

Q. Did you have any conversation with him at that time concerning the accident?

A. To the best of my knowledge, I did. [32]

Q. Was anyone else present?

A. I believe Mr. Fraser was there.

Q. Do you recall what the substance of that conversation was at the present time?

A. Not definitely, but I think it pertained to the medical payments feature of the policy he held.

Q. In any event, during that conversation was any mention made as to whether or not Mr. Towry had or had not been drinking prior to the accident?

A. None, to my recollection.

Q. Did you have occasion to discuss this accident with Mr. Towry subsequently?

A. Yes, I did.

Q. Can you tell us approximately the next time you talked to him?

A. I believe it was in July of 1949.

Q. Where did that conversation take place?

A. At his home in Oxnard.

Q. What time of the day was it?

A. I think it was in the morning.

Q. Was anyone else present?

A. Mrs. Towry, his wife.

(Testimony of John William Medlen.)

Q. His wife? A. Yes.

Q. Is his wife related to either of the plaintiffs [33] in this action?

A. I believe his wife is the former Helen Delozier, the sister of Vivian Winget, the plaintiff.

Q. Did you ask Mr. Towry any questions relating to the accident at that time? A. I did.

Q. Did you reduce the statement made by him to writing? A. I did.

Q. When did you do that?

A. I believe I took notes from Mr. Towry on one day and perhaps wrote the statement out in longhand, and perhaps a day or two later had a typed statement and returned to his home and asked him to sign it.

Q. Several days after your first conversation?

A. I believe it was two or three.

Q. And did Mr. Towry sign the statement when you returned it to him? A. Yes, he did.

Q. Did you have any further discussion or conversation with him concerning the statement at the time he signed it?

A. When I returned with the typewritten statement, I, of course, asked him to read it over and make certain everything I had caused to be typed there was correct. [34]

Q. Did he read the statement you had typed in your presence? A. Yes.

Q. And did he then sign it?

A. That is correct.

Q. I show you a two-page typewritten statement

(Testimony of John William Medlen.)

bearing date July 11, 1949, and purporting to be signed by Billy Ray Towry, and ask if that is the document to which you have referred?

A. That is the document, yes.

Q. I note on page 1 the initials "B.R.T." Can you tell us who put the initials on the first page?

A. Billy Ray Towry.

Q. That was in your presence?

A. That was in my presence.

Q. I notice the initials on the second page after the sentence reading, "I have read the above statement of approx. 1¾ pages and it is true to the best of my knowledge. B.R.T."

Who put the initials "B.R.T." there?

A. Billy Ray Towry.

Q. In your presence? A. That is correct.

Q. And he subsequently signed on the following line, "Billy Ray Towry"? [35]

A. That is correct.

Mr. Wynn: We offer this as defendant's exhibit next in order, if the court please.

The Court: It may be received and marked Exhibit E.

The Clerk: So marked.

(The document referred to was received in evidence and marked Defendant's Exhibit E.)

The Court: I notice it is 12:00 o'clock. I think it is time to take our noon recess.

Ladies and gentlemen of the jury, we are about to take another recess. It is my duty to admonish

(Testimony of John William Medlen.)

you you are not to discuss this case with anyone, you are not to allow anyone to discuss it with you, you are not to formulate or express any opinion as to the rights of the parties until this case has been finally submitted to you.

With that admonition, we will now recess until 2:00 o'clock, this afternoon.

(Thereupon, a recess was taken until 2:00 p.m.) [36]

March 27, 1951—2:00 P.M.

(The following proceedings were had outside the hearing and presence of the jury:)

Mr. Wynn: If the court please, in these consolidated cases, counsel for plaintiff Mack have agreed with counsel for the defendant to a settlement of the claim of Mack upon the stipulated judgment in favor of Mack in the sum of $6,000. Together with this stipulation for judgment is submitted at the present time an application for a ruling of the court that the plaintiff Winget *in* limited in any event to a recovery under the policy of the defendant in the principal sum of $10,000 plus interest and costs.

It is further moved by defendant Standard Accident Insurance Company and the plaintiff Mack that this court make its order at this time authorizing the defendant Standard Accident Insurance Company to effect and conclude the settlement with the plaintiff Mack upon the terms stated.

(Testimony of John William Medlen.)

Mr. Hollingsworth: We join in that stipulation, may it please the court, on behalf of the plaintiff Thomas B. Mack, and also in the request for the order to the effect that the total recovery on behalf of the plaintiff Winget under the terms of the policy set forth in the pleadings and admitted by counsel be limited to the sum of $10,000, together with costs and interest to date. [37]

Mr. Heily: Your Honor, on behalf of the plaintiff Winget, I oppose the motion and point out to the court there is at the present in existence an injunction by the State court, which I believe is a valid injunction, preventing the defendant Standard Accident Insurance Company from settling with the plaintiff Mack at any time until final disposition of this case.

In addition, I have a letter signed by Mr. Wynn, dated September 26, 1950, advising me that, "Our client," referring to Standard Accident Insurance Company," has no intention of paying any amount to Harry B. Mack, his attorneys or agents, before a final decision in this case."

In addition, your Honor, we feel that the law, and the only law that has been found on the point, favors the position of the plaintiff Winget to the effect that she is entitled to the pro rata share of the total of $20,000 due and payable under the terms of the policy.

I further direct your attention to the fact that once liability has been established, then it becomes a matter of a moot question so far as the insurance

(Testimony of John William Medlen.)

company is concerned as to whether the money is split pro rata or not.

I direct your attention further to the fact that you denied a motion to remand this cause to the State court on the grounds, as I understand it, that the controversy between the plaintiff Winget and the plaintiff Mack was entirely [38] a separate controversy from the one between the plaintiff Winget and the defendant Standard Accident. If the court is to remain consistent with that ruling given on that motion to remand, it must decide against the present motion before the court.

There is a brief on file in the Winget case by me in which I brought out these points of law, in which I have set out definite State law against the granting of this motion in favor of prorated distribution. There is no law to the contrary anywhere in the country that I have been able to find, and I have searched diligently, no law whatsoever to the contrary.

The Court: Doesn't it seem awfully strange to you that this question hasn't been raised before?

Mr. Heily: No, your Honor, it does not seem strange to me, because it seems so just and fair, and that is probably why it never has been raised before. That is why it has never been raised very often. It has been raised.

The Court: In California?

Mr. Heily: Not in California. Counsel for the other side has cited no cases in the whole country in favor of their position.

(Testimony of John William Medlen.)

Mr. Wynn: I must challenge that.

The Court: Just a moment, please. It seems to me that the insurance companies have been writing policies like this [39] for years in California, where they have a 10 and 20 liability. It seems to me that if there was any merit to your contention that you could set aside the terms of the policy so that one person could collect more than the limits that there would be some recorded cases. I am quite sure that the insurance companies wouldn't allow a contract to be interpreted in that way without protesting in some way by a hearing. The fact that there are no cases is an indication to me that nobody has ever raised the issue.

Mr. Heily: The reason why the insurance company has never raised the issue is because the insurance company is paying the limit of their liability under the policy, anyway, for the one accident, and how the money is split from that time on is a matter entirely immaterial to them. That is my understanding of your ruling in refusing to remand the case, that that very point prevents a controversy between the insurance company and the defendant Mack and the plaintiff Winget, and that is the reason why the case was not remanded.

Let's put it on another basis of any time a creditor has money coming from a debtor, and another creditor has money coming from a debtor. Surely you are not going to prefer one over the other when

(Testimony of John William Medlen.)

the money is all there to be divided pro rata according to their just dues.

The Court: How are you going to get around this where it says, "bodily injury liability, $10,000 each person"? [40]

Mr. Heily: $10,000 each person. I will explain how I get around that, and that is this. $10,000 for each person is the limit of the company's liability to any one person injured in the accident. $20,000 is the limit of the company's liability for the whole accident regardless of how many people are injured. When they satisfy that liability by paying the money into court or by paying it pursuant to an order of court, designating pro rata distribution, then their liability under the policy is discharged. From that time there is nothing further for them to be concerned with. It is just like a creditor putting his money into this court for distribution—I mean a debtor putting his money into this court for distribution between his creditors on a pro rata basis. There isn't a single difference. The contract. as far as I am concerned, means only that there is $20,000 due under it. How it shall be pro rated is up to the court.

The Court: Well, you cite this case in 161 Atlantic 101. In that case, evidently, there was a $10,000 limit.

Mr. Heily: A 5 and 10 policy.

The Court: And there were four judgments.

Mr. Heily: Yes.

The Court: Rendered at different times.

(Testimony of John William Medlen.)

Mr. Heily: In that case, the court held the money would be applied pro rata.

The Court: If we had a third party in here and each of [41] the parties had a judgment for more than $10,000, then it would be impossible to have settled with each of the parties with a liability of $10,000. Then there might be some reason for pro rating it.

Mr. Heily: Let me give you a little of the history behind this law that I have discovered on this point. If the case has not proceeded to judgment, then a person that has a claim that has not proceeded to judgment has no standing in court to make the request we have. There is one distinction. But where the creditors have proceeded to judgment, and especially in the same case, on the same day, at the same time, each of them has a property interest in the nature of a judgment lien upon this fund of $20,000. That is what the cases say.

The Court: Well, if this policy provided that the liability would be $20,000 for each accident and eliminated the $10,000 for each person, I would go along with you. You cite two cases here, an Oregon case, Morris vs. Port of Astoria, and Lewis and Dolan, Inc., vs. Clark Lumber Company, also an Oregon case, 204 Pacific 130. In those two cases there was a fund. There was no limitation as to each individual. There was a fund and the court held where there was a fund, it should be pro rated.

Mr. Heily: Yes. I believe I distinguish those cases on that point. The Sentry case is the only

(Testimony of John William Medlen.)

case directly in [42] point that has been presented to you by any of the parties to this action. It is directly on the point involved.

The Court: Well, I don't think there is any question about what the policy says. There is no dispute. The policy says the limit is $10,000 for each person. If I awarded more than $10,000 to each person, I am really setting aside the contract.

Mr. Heily: No, your Honor. Let me give you this case of O'Donnell vs. New Amsterdam Casualty Company, 146 Atlantic 770. In that case several plaintiffs brought action to recover on judgments totaling $55,000. The limit of liability under the policy was $20,000. There were several complaints still pending for trial. The ones that were before the court had judgments, you see, the same as here. They had agreed upon a distribution of the proceeds. The question of priority or pro rata didn't arise in that case because they had agreed on a pro rata distribution, but the court held in that case the company was discharged from further liability, from paying the full amount of the liability under their policy. That isn't changing their contract in any respect. Their contract is discharged and completely fulfilled by paying their $20,000.

The Court: If the insurance company would pay $20,000 in this court and the plaintiffs could agree as to its distribution, I don't think there would be any of this. [43]

Mr. Heily: That is true, but we are asking for a determination by the court of what we are en-

(Testimony of John William Medlen.)

titled to. That is the only difference. Under the law and justice of equity, it is the only fair thing to do, to give the one with the greater judgment the greater share. Supposing we had a terribly mangled case, Mrs. Winget here terribly mangled, and her judgment was $150,000 and Mr. Mack had $15,000. Are we to say that she is only entitled to $10,000?

The Court: That's what the policy says.

Mr. Heily: No, your Honor, the policy does not say that. I contend that the policy says exactly the reverse.

The Court: Let's hear from the insurance company to see what they have to say about this, for the purpose of the record.

Mr. Wynn: There isn't much more I can add, your Honor, except to comment, No. 1, on my letter that counsel read. Do you have that available, counsel? I want to read the preceding paragraph.

> "At the time of filing of notice above mentioned"—that is the notice of removal—"with Deputy Clerk Margaret Harrison, I advised said deputy an order to show cause was set for hearing at 10:00 a.m., and requested the clerk to make sure the documents on file by me were called to the attention of the judge prior [44] to the time of the hearing. The deputy clerk immediately left her desk, stating that she would at once place the documents in the file so that the judge would have them before him when the case came on for hearing."

(Testimony of John William Medlen.)

The Court: My understanding is that the minute the petition for removal is filed, a bond is put up in the Superior Court, and there is nothing the Superior Court can do until it is remanded back to them. Any order made after the filing of the petition and putting up of the bond is a nullity. That is my understanding of the law.

Mr. Wynn: That is my understanding. Next, counsel observed that your Honor's denial of the petition to remand here was based on the belief that there was a separable controversy. At that time we cited, and I think the court considered, the case of Mannheimer Brothers against Kansas Casualty Insurance Company, 184 Northwestern 189. Without quoting the language from that, the court will recall that that was precisely in point. Two judgments had been obtained against the assured. The total amount exceeded the $10,000 total coverage of the policy. One assured had been paid $2,500. After making such payment, the plaintiff brought suit against the defendant insurance company, the plaintiff being the assured. Having paid the amount of the other judgment, the policy involved provided the company's liability [45] under paragraph 1 of the insuring agreements on account of bodily injury to or death of one person was limited to $5,000, just as in the case at bar it is limited to $10,000, and subject to the same limit for each person. The company's total liability on account of bodily injury to or death of more than one person is limited to $10,000.

(Testimony of John William Medlen.)

It was contended by the plaintiff that since the insurance company had only been compelled to pay $2,500 on account of the injuries sustained by one person it should be compelled to add the remaining $2,500 to the $5,000 admittedly due on account of the other judgment.

The court held the position, therefore, that the liability of defendaing under the terms of the contract above quoted is limited to $5,000 for each person injured, and the trial court was right in so holding. This disposes of plaintiff's further point that since the full $5,000 wasn't used in paying the claim, the plaintiff may claim the balance of the amount to $10,000. To grant this contention would also amount to a judicial remodeling of the contract.

The Court: Well, in my mind, there is no question that the limit is $10,000 for each person, and the fact that one person cannot get judgment for $10,000 or cannot collect $10,000 is no reason the difference should be added to the other liability.

I understand that there was a restraining [46] order issued in this case after the petition for removal had been filed. I will now make an order vacating that restraining order on the ground that the Superior Court does not have jurisdiction to make the order.

Mr. Heily: May I point out that is a question of fact as to whether it was filed before the order was granted or not.

The Court: I understood you stipulated. If you haven't stipulated, then——

(Testimony of John William Medlen.)

Mr. Wynn: May I ask permission to be shown my testimony as to the filing——

Mr. Heily: Your Honor, perhaps we can stipulate. I will stipulate as to the fact that Mr. Wynn was there and presented the court with the papers.

The Court: And presented the bond?

Mr. Heily: Presented the papers to the clerk at the time when the file was before the court and on the court's desk. It becomes a question, in my mind, of law then as to whether that constitutes filing or not.

The Court: When you file a case in this court, what do you do? You go to the clerk's office and file it.

Mr. Heily: Yes.

The Court: And they put a stamp on it. Isn't that filing it?

Mr. Heily: It is filed, but isn't it also [47] necessary when you file something in a case that is pending for that file to reflect the fact that it is filed in it?

The Court: I don't think so.

Mr. Heily: It must be, your Honor, because otherwise this very situation would not have occurred.

The Court: I don't think so. You go over to file it with the clerk, and it is put in a drawer and it may not be in the file for two or three days.

Mr. Heily: That is negligence on the part of the clerk.

(Testimony of John William Medlen.)

The Court: I wouldn't say so. It is a question of personnel, not a question of negligence.

Mr. Heily: I contend it is not filed, especially in a case where the thing is before the court.

The Court: I am going to rule against you on that. The minute they take it to the clerk's office and file it, and the clerk accepts it and stamps it, it is filed regardless. If that was done before the court ruled, the court didn't have jurisdiction.

Mr. Heily: That was done.

The Court: Is that the fact?

Mr. Heily: Yes.

The Court: Then I will vacate the restraining order on the ground that the Superior Court lost its jurisdiction upon the filing of the petition to remand. [48]

Mr. Heily: We also have a request in the complaint for the issuance of a restraining order, and that request would apply in this court.

The Court: All right. I will deny it. I will dispose of that right now.

Mr. Heily: I relied upon Mr. Wynn's statement he would not pay anyone off, or in an abundance of caution, I would have requested this court to issue it.

Mr. Wynn: Mr. Wynn stated he would not pay until further order of the court.

The Court: Do you want to file a petition restraining the insurance company from settling?

Mr. Heily: No, your Honor. The petition is on file and you have just denied it.

(Testimony of John William Medlen.)

The Court: I will deny it. If you want to do some more work and file a petition, I will deny it when you get around to it.

Now, I assume that with the vacating of the restraining order, the insurance company can make any settlement it wants to as far as Mack is concerned. I will make a ruling the liability to each person is $10,000 as set forth in the policy.

Mr. Wynn: Your Honor, I thought I had offered that on behalf of counsel for Mack and the defendant, there is a stipulated judgment in favor of the plaintiff Mack in the sum [49] of $6,000. Wasn't that correct?

Mr. Hollingsworth: Yes.

The Court: $6,000?

Mr. Hollingsworth: $6,000.

The Court: How about interest?

Mr. Hollingsworth: That is the total amount.

The Court: $6,000?

Mr. Hollingsworth: Correct.

The Court: No costs?

Mr. Hollingsworth: No costs.

The Court: Such may be the order. Will you prepare a formal order for the files in this case? We like to have a formal order prepared on these matters.

Mr. Wynn: That will be done, your Honor.

The Court: That leaves for disposition the other case.

Mr. Henderson: I assume that we may withdraw?

(Testimony of John William Medlen.)

The Court: As far as I know, you may withdraw. You have no other interest in this case unless you want to help associate counsel.

Are you ready to proceed in the other matter?

Mr. Heily: Yes, your Honor.

The Court: We will take our recess first and then start in.

(Recess.) [50]

The Court: Is it stipulated the jury is present and in the box?

Mr. Heily: So stipulated.

Mr. Wynn: So stipulated.

The Court: Ladies and gentlemen of the jury, since noon a settlement has been made with the plaintiff Mack, and the plaintiff Mack is no longer in this case. The only plaintiff in this case now is the plaintiff Winget. The fact that a settlement has been made with the plaintiff Mack shall not be considered by you in any way relative to the establishment of the liability in the case now before you. You must disregard it entirely.

The defendant in this case is not waiving in any way the issue that has been raised in this case relative to the question of cooperation. That is the only issue before you in this case, is the question of cooperation.

Do you want me to add anything more? Doesn't that express the situation to the jury.

Mr. Heily: Yes.

Mr. Wynn: Yes, sir.

(Testimony of John William Medlen.)

The Court: You may proceed.

Mr. Wynn: I have two preliminary matters. The clerk of the Superior Court of the State of California for Ventura is here under subpoena with the files in the two actions mentioned. I think counsel has agreed with me that all items [51] from those files which we desire to submit in evidence here have been so submitted, with the exception of a partial transcript which counsel has handed me and which I am willing to stipulate to. So I would ask the court to relieve the Clerk of the Superior Court from further attendance, with the agreement of counsel.

Mr. Heily: If the court please, that was not my understanding with reference to the clerk. It was with reference to the court reporter. There is one matter of some jury instructions I want the clerk for.

The Court: Might I suggest to you you withdraw this witness and put the clerk on the stand and get the testimony you want from him so he won't have to come back tomorrow? I know the clerks are very busy.

Mr. Wynn: I have no questions, your Honor.

The Court: Have you got a document there you want introduced in evidence?

Mr. Wynn: Plaintiff's counsel has.

Mr. Heily: Yes, your Honor.

The Court: Then will you step down, please?

(Witness withdrawn.) [52]

WILLIAM R. PEACOCK

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: William R. Peacock.

Direct Examination

By Mr. Heily:

Q. You are a deputy clerk of the Superior Court of Ventura County, State of California?

A. I am.

Q. Do you have with you the files of the two actions, one of which is entitled Delozier vs. Towry, and the other is entitled Mack vs. Towry?

A. I have.

Q. Do you have with you the instructions given at the time of the trial of those actions?

A. I have.

Q. Will you direct your attention to the instructions offered by the plaintiff Delozier, No. 27 and No. 30? A. Yes.

Q. Directing your attention to instruction No. 27, defendant's requested instruction, is that an instruction that was offered by the defendant in that case? [53] A. To my knowledge, it was.

Q. And was that instruction given?

A. No. It was either withdrawn or refused.

Q. Do you find a notation on it as to whether it was given or refused? A. It was refused.

Q. And what does the notation say?

Mr. Wynn: Just a moment. I object to this

(Testimony of William R. Peacock.)

witness testifying as to whatever the instruction was, the contents thereof, or as to what notations are made by the trial court, on the ground generally that it is immaterial in this action, the only issue being raised by the defendant's affirmative allegations in its answer being the truth or falsity of representations made prior to the date of the trial. Whatever occurred during the trial has no bearing on that issue.

The Court: May I ask counsel how the fact that an instruction was or was not given would bear upon the question of the cooperation of the insured in this case?

Mr. Heily: Your Honor, the reason the defendant Standard Accident Insurance Company claims non-cooperation is because it deals with the matter of intoxication. We propose to prove there was no evidence of intoxication in this case. That instruction goes to prove that very fact.

The Court: My understanding is that at a certain time prior to the trial, the insurance company notified the [54] insured that it would not be responsible because of the non-cooperation of the insured. It seems to me that anything that happened after that is absolutely immaterial. In other words, I don't think the insurance company could rely upon any non-cooperation after they had refused to accept liability.

Mr. Heily: It goes to this point, your Honor. In order for the insurance company to avoid liability on the ground of non-cooperation, they must

(Testimony of William R. Peacock.)

show that Mr. Towry wilfully and falsely represented a fact, and that that fact is a material fact. Now, if this matter of drinking is material to the issues in the case in the state court, then perhaps there is something to their defense, but we intend to show, and that is what I am attempting to do now, that the matter of whether the man was drinking or not is immaterial, and any representation he makes is immaterial because there wasn't any evidence of intoxication.

The Court: Let me ask you, in your complaint did you allege that the insured was drinking at the time of the accident?

Mr. Heily: Yes. We alleged that in our complaint and we moved to dismiss that allegation and that count in our complaint, and our motion was denied because counsel objected.

Mr. Wynn: Just a moment. I am going to object to these statements. [55]

The Court: If you are going to argue, it should be outside the presence of the jury.

Mr. Heily: This is what we propose to prove.

Mr. Wynn: I think that is prejudicial and the court feels likewise. Any statement made by counsel now as to what occurred would be prejudicial at this time.

The Court: Ladies and gentlemen of the jury, you are instructed no statement made by counsel, either in speaking to the court or speaking to each other or to you, is evidence in this case. It is purely the opinion of counsel. The court may disagree

(Testimony of William R. Peacock.)

with either counsel or both counsel as to what the law of this case is, so you will disregard the statement of counsel as to what the facts are.

Mr. Heily: You see, your Honor, the evidence concerning intoxication only goes to prove the materiality of any representation concerning it.

The Court: My understanding is, and you have stated before the jury, that this instruction was offered and it has been refused.

Mr. Heily: And the reason why it is refused is what we are presenting.

The Court: Is there a notation on the instruction?

Mr. Heily: Yes, your Honor.

The Court: Usually the court just marks it "Refused," without any other reason. [56]

Mr. Heily: In this case the court indicated a reason.

Mr. Wynn: Of course, I object.

The Court: Counsel, I suggest that you have the instruction marked for identification and leave it here, that is, if the clerk will leave it here, and I will rule upon the question a little later on as to whether or not the refusal or the reason for it can be read to the jury.

Mr. Wynn: That is agreeable to the defendant.

The Court: Of course, the clerk may not want to be locked up all night with his instruction.

Mr. Heily: That will be satisfactory. I don't know whether the clerk can leave the instruction.

The Clerk: Could it be photostated?

(Testimony of William R. Peacock.)

The Court: Yes, I think it could be photostated.

Counsel, I suggest this to you, that you make a copy of the memorandum and stipulate that is what is on the instruction and leave it here subject to future ruling of the court.

Mr. Heily: Very well. I will offer that for identification purposes, your Honor, with the right to substitute a copy.

The Court: It can be marked for identification only.

The Clerk: Winget's Exhibit 1, your Honor.

(The document referred to was marked Plaintiff Winget's Exhibit No. 1 for identification. [57]

The Court: Before the clerk gets away, will you make a copy of that and agree as to the copy so that there can be no question as to what is in the record?

Mr. Wynn: I was going to inquire of counsel whether he had a copy of that instruction in his file. Otherwise, we could substitute it.

Mr. Heily: I may be able to locate one.

The Court: Is there more than one instruction you want?

Mr. Heily: There are two, your Honor.

The Court: This was what instruction?

Mr. Heily: That was instruction of the defendant 27.

If the court please, due to the fact that this witness was called out of order and we did not have

(Testimony of William R. Peacock.)

him fully prepared, I therefore now ask to withdraw him and allow him to make an examination of those instructions so he can testify regarding them.

The Court: How many more instructions are there?

Mr. Heily: I don't believe there are any more to introduce, but I want him to testify generally regarding all of the instructions.

The Court: In what way?

Mr. Heily: As to whether there are any in the file that were given concerning this point.

The Court: I don't think that the instructions are material. The judgment was rendered in this case against the [58] defendant in that particular lawsuit. The judgment speaks for itself.

Mr. Wynn: Our defense is clearly defined and that is that there were matters of fact falsely represented to the defendant prior to the time of trial. What occurred at the time of the trial is a matter of interest, perhaps.

The Court: I think the only question in this case was the lack of cooperation on the part of the insured, and I think that lack of cooperation must be lack of cooperation before the insurance company denied liability. After they denied liability, I don't think they could raise the question.

Mr. Heily: Your Honor, it is lack of cooperation regarding a material point. To determine whether the point is material, we must go to the

(Testimony of William R. Peacock.)

trial itself. That is the only purpose of his testifying.

Mr. Wynn: Perhaps, if I may be permitted, our discussion and the argument now is going to be on matters that should be presented out of the presence of the jury in that we are necessarily involved in questions of law.

The Court: I am rather satisfied that if this argument is continued, the jury ought to be excused. You don't want to bring back the witness before tomorrow?

Mr. Wynn: As a matter of fact, we have another witness who is an attorney and in the same position and would like to [59] be called today, and I agreed, with the court's consent, to do so.

The Court: Supposing you withdraw this witness and let him look at his instructions. We will call this attorney and maybe we won't get in an argument with him. Maybe we can get rid of him this afternoon, and then we can still get rid of the clerk.

Mr. Wynn: Mr. Willard.

ROBERT B. WILLARD

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Robert B. Willard.

(Testimony of Robert B. Willard.)

Direct Examination

By Mr. Wynn:

Q. You are an attorney at law admitted to practice in the State of California?

A. That is correct.

Q. And have been for several years last past?

A. That is correct.

Q. You maintain offices in the City of Ventura and County of Ventura? [60]

A. For the last two years, yes.

Q. During that period of time, that is, during the last two years, have you had occasion to represent professionally Mr. Towry? A. I have.

Q. Do you recall any professional dealings with Mr. Towry on or about March, 1950?

A. Yes, I do.

Q. I recognize, of course, your professional relationship, but did you have occasion to discuss with Mr. Towry, the signing of a deposition in an action in which he was the defendant, pending in the Ventura Superior Court?

A. Yes, I did discuss it with him.

Q. Approximately when was the first discussion you had with Mr. Towry concerning this deposition?

A. Mr. Towry's father came in to my office on either March 14th or March 15th in 1950, and asked if I would help his son with respect to this lawsuit that was pending against him. I discussed the matter rather fully with his father, and Mr. Towry

(Testimony of Robert B. Willard.)

came in a day or two later. I can't give you the exact date. But it was in the week commencing Monday, March 13th, and it was probably the 16th or 17th of March, 1950.

Q. That is the year 1950? A. Yes, sir.

Q. At the time Mr. Towry came in, did he bring with [61] him the original deposition he had given in the lawsuit?

A. I am quite sure he did not.

Q. On any occasion while he was in your office, did he have the original deposition with him?

A. Yes, he did. I am not sure whether he brought it in or whether I obtained it from the reporter's office, but we had the original deposition during March, 1950, in my office.

Q. In any event, you discussed with him the contents of the deposition? A. That's right.

Q. During that conversation, did Mr. Towry indicate to you he wished to change some of the answers made in the deposition?

A. Yes, he did.

Q. Did he, in your presence, change those answers? A. Yes, he did.

Q. Did he then sign the deposition before a notary public? A. Yes.

Q. To the best of your recollection, that was somewhere around March 16, 1950?

A. Mr. Towry corrected the deposition in his own handwriting and signed it and swore to it before a notary public. I think it was probably a few days after March 16th. [62] He came in the office several times and we talked this over fully,

(Testimony of Robert B. Willard.)

and I know that it was prior to the time the trial started on March 27th, but I can't give you the exact day.

Q. Do you recall the name of the notary public before whom he signed the deposition?

A. Walter J. Fourt.

Q. And he officed just across the hall from your office? A. That is correct.

Q. Were you present when Mr. Towry signed the deposition? A. I was present, yes.

Q. Had Mr. Towry made these changes in the deposition in his handwriting at the time he appeared before Judge Fourt?

A. He had just completed making the changes in his handwriting.

Q. Immediately after the changes were made, you went to Judge Fourt's office and he signed the deposition?

A. I might explain it this way. It was either on a Saturday afternoon, Sunday, or in the evening, when he finished making the corrections on the deposition, and we then began looking for a notary public. While I was telephoning a notary public at his home, I heard Mr. Fourt come in and we then went over to Mr. Fourt's office. It was probably 15 or [63] 20 minutes following the time Mr. Towry had completed making the changes that he signed the deposition.

Q. Further to fix the date of your conversation with Mr. Towry, when he made these changes, did

(Testimony of Robert B. Willard.)

Mr. Towry indicate to you that he had received any communication from his insurance company?

A. Yes, he did so indicate, and showed me the communication.

Q. Do you recall the date of that communication? A. It was March 13, 1950.

Q. And then it was in a matter of two or three days after that that he came to you to change the deposition?

A. That is correct, to the best of my recollection.

Mr. Wynn: That's all.

The Court: May I ask this witness a question?

Mr. Wynn: Certainly.

The Court: I understand that your testimony is that he didn't sign the deposition until after he had made the changes?

The Witness: That is correct, yes, your Honor.

Cross-Examination

By Mr. Heily:

Q. After he had made those changes, Mr. Willard, did you advise the attorneys for the insurance company that the [64] changes had been made?

A. Yes, I did.

Q. When did you notify them to that effect?

A. Well, it was prior to the trial on March 27th. I can't state the exact date. On March 20, 1950, there was a motion filed in this case, in which I represented Mr. Towry in opposition to the attorney for the insurance company, and on that date

(Testimony of Robert B. Willard.)

I had a rather lengthy discussion with one of the attorneys for the insurance company, at which I know I either told him that the changes had been made or would be made. I do not recall whether they had been completed at that time.

Q. Did he ask you anything about the nature of the changes?

Mr. Wynn: I object to this question. No proper foundation laid. I would like to have the date, time, persons present, and so on, as long as he is going into a conversation.

The Court: You are the one who laid the foundation. You opened the door.

Mr. Wynn: Well, now he is relating a conversation, but no date or time. There is no foundation for this conversation.

The Court: It is my understanding that when he came in to sign the deposition is the time, or am I wrong? [65]

Mr. Heily: It is on the 20th of March, to the best of my recollection.

Mr. Wynn: This is another date, your Honor.

The Court: Well, I will sustain the objection upon the ground that the proper foundation has not been laid.

Q. (By Mr. Heily): Where did this conversation with the attorney for the insurance company take place?

A. It took place in the court house at Ventura in the law library or in the court room, one of the two places.

(Testimony of Robert B. Willard.)

Q. Who was the attorney?

A. I will have to refer to my notes. It was one of the five or six gentlemen in the firm there.

Q. May I suggest Thompson?

A. Mr. Thompson of Kelly, Bauder, Thompson, Kelly and Veatch.

Q. It was Mr. Thompson with whom you had that conversation? A. That is correct.

Q. That was on or about the 20th of March in the court house in Ventura? A. That's right.

Q. Who else was present?

A. No one else was present who overheard the conversation.

Q. At that time was Mr. Thompson representing the [66] insurance company on behalf of Mr. Towry?

Mr. Wynn: That calls for an opinion and conclusion of the witness.

Q. (By Mr. Heily): If you know.

A. I can only answer that by this explanation. Mr. Thompson was present in Ventura presenting a motion to withdraw as counsel for Mr. Towry. I represented Mr. Towry in opposition to the motion allowing Mr. Thompson to withdraw. The court refused to grant Mr. Thompson's motion and stated that Mr. Thompson must remain as counsel and try the case.

Then Mr. Thompson and I sat down to discuss the case on its merits.

Q. In making his motion to withdraw from the case, did he advise the court he was acting on be-

(Testimony of Robert B. Willard.)

half of the Standard Accident Insurance Company in making his motion?

A. To the best of my recollection, he indicated Standard Accident Insurance Company had disclaimed liability and he wanted to be let out as attorney of record in the trial of the case.

Q. In order to refresh your memory regarding that matter, I hand you what purports to be a notice of motion to withdraw as attorney for defendant Towry, and ask you to look at the verification on that and then tell us, if you can, for whom Mr. Thompson advised you he was working.

A. Mr. Heily, I think I have explained that rather [67] fully to you. Mr. Thompson sought to be relieved as counsel for Mr. Towry. I looked over the notice of motion which he had served upon—purported to serve upon Mr. Towry, and found that he had not mailed it to Mr. Towry's address. Mr. Towry didn't have that paper or any notice of that action, and only after I examined the full file did I find the motion was coming up.

I then made a special appearance in opposition to the motion on the ground that the court had no jurisdiction to hear the motion and the court agreed with me and refused to hear the motion on the ground it had no jurisdiction to pass upon the matter. That left Mr. Thompson as attorney of record in the case.

I don't recall any discussion with him as to whom he represented, but he was attorney for Mr. Towry

(Testimony of Robert B. Willard.)

and he couldn't get out of it, and he told me he was going to go ahead and to defend the case.

Q. Do you recall seeing the original of what this purports to be?

A. I did see the original of that notice of motion in the court file in Ventura.

Q. Does that indicate therein for whom Mr. Thompson was acting?

Mr. Wynn: I object to that question as leading and suggestive. The witness has already been asked and has answered [68] the question.

The Court: Might I suggest to counsel, we have the file here, don't we? The file is the best evidence. If you have got the file here with the copy of the motion, the motion speaks for itself. I don't know whether the file will disclose what the ruling was.

Q. (By Mr. Heily): I hand you an official file and ask you if that is the motion you examined.

A. Yes, Mr. Heily, that is the motion.

Mr. Heily: I now ask permission to read a portion of that document. This is a notice of motion to withdraw as attorney for defendant Towry and an affidavit in support thereof filed by Bauder, Gilbert, Thompson, Kelly and Veatch for the defendant Towry. The affidavit in support of it reads in part as follows:

"State of California,

"County of Los Angeles—ss.

"Robert E. Kelly, being first duly sworn, says he is one of the attorneys of record for

(Testimony of Robert B. Willard.)

defendant Billy Towry. On October 7, 1949, my firm was retained by Cass and Johansing, legally authorized agents for Standard Accident Insurance Company of Detroit, to defend Billy Towry, sued as Billy Ray Towry.

"I proceeded to file an answer in behalf [69] of said Billy Towry and said company. On the 13th of March I was informed by Standard Accident Insurance Company of Detroit, plaintiff, through their legally authorized agent, that they had sent to defendant Billy Ray Towry a notice of disclaimer under that said automobile policy No. J894065, stating in said notice of disclaimer the reasons thereof, and I was instructed by said Standard Accident Insurance Company of Detroit, through their legally authorized agent, to file notice and withdraw as attorney for defendant Billy Towry."

The Court: What was the date of the notice of disclaimer, when the notice was sent?

Mr. Wynn: March 13th.

Mr. Heily: March 13, 1950.

Q. So it was on the 20th of March that Mr. Thompson appeared in court to be relieved of representation on the part of Billy Towry, is that correct? A. That is correct, yes.

Q. And you opposed that motion on behalf of Mr. Towry? A. That is correct.

Q. And the court would not let Mr. Thompson get out of the case, is that correct?

(Testimony of Robert B. Willard.)

A. That is correct. [70]

The Court: Can it be stipulated he continued in the case and handled the defense?

Mr. Heily: Yes.

Mr. Wynn: So stipulated.

Mr. Heily: He did continue and handled the defense very ably.

The Court: I don't know whether opposing counsel will agree to that last statement.

Mr. Wynn: I refuse to stipulate that.

Q. (By Mr. Heily): At the time Mr. Towry made the changes in the deposition, did he discuss with you the reasons for making the changes?

A. Yes, he did.

Q. What did he say?

Mr. Wynn: Well, I think I will object to that as hearsay, not made in the presence of any persons representing the defendant.

The Court: I think I will overrule the objection.

Mr. Wynn: Very well.

The Witness: We had a lengthy discussion of this, Mr. Heily. It lasted probably two hours. It was a year ago and I don't remember everything that was said, but I do recall asking him to tell me in detail everything that happened on the day of this accident, which he did.

I asked him in particular about drinking, [71] whether he had had anything to drink, and if so, what, and he told me he had had a small quantity of beer during the day and nothing else to drink.

I asked him what he had told the insurance com-

(Testimony of Robert B. Willard.)

pany and why they were attempting to withdraw from the case, if he knew.

He explained to me in his deposition he had indicated he had not had any intoxicating liquor to drink.

I was concerned about that and asked him why, what the circumstances were when the deposition was given.

He stated to me that he had not had any opportunity to talk with counsel for the insurance company prior to the giving of the deposition, that he met his attorney, went into Mr. Hollingsworth's office, and they immediately started asking him questions, and when they came to the question of intoxicating liquor, he wasn't sure in his own mind whether beer was within the category of intoxicating liquor; that he wanted to protect the insurance company as much as he could, and he just said no, he hadn't had any intoxicating liquor to drink.

I then explained to him I thought it of the utmost importance that he correct his deposition until it stated the actual and absolute truth, I thought that was his duty, and he agreed that he would do so.

Then I went through the deposition with him in [72] detail, question by question, and asked him exactly what the facts were, and when he came to any answer that he considered not wholly accurate, I had him write in his own handwriting the correction on the face of the deposition.

In addition to that, I had quite a lengthy discussion with him about this technical point, as to

(Testimony of Robert B. Willard.)

whether the insurance company lawyers could withdraw from his defense. I don't know whether you want me to go into that.

Q. That is sufficient. Thank you. That's all. I believe I was about to go into the conversation with Mr. Thompson.

At the time you had the conversation with Mr. Thompson, you did advise him, did you not, the deposition was changed or about to be changed, is that correct? A. That is correct.

Q. Did you go into a discussion as to in what particulars the deposition had been changed?

A. I don't remember at this time how much detail I went into but I do know that I told Mr. Thompson that the deposition either had been or would be changed with respect to the question of his having had beer on the day of the accident.

Mr. Heily: That's all. [73]

Redirect Examination

By Mr. Wynn:

Q. Mr. Willard, when you first saw Mr. Towry in connection with this case, did he advise you that he had made a report to the insurance company shortly after the accident in which he denied the use of any intoxicants?

A. I think, if I refer to my notes, I could probably answer that better.

Q. Without referring to your notes, do you have any recollection?

A. I don't have any recollection of that.

(Testimony of Robert B. Willard.)

Q. Do you have any recollection that he told you that during the summer of 1949, he had made a written statement signed by him in which he denied the use of any intoxicants?

A. I have no recollection of that.

Q. When you went over the deposition with him in detail and he indicated to you he did not think beer was an intoxicant and answered as he did, did you point out to him the questions where he was directly asked whether he had consumed any beer?

A. We certainly went over those questions before we got through correcting the deposition.

Q. And when you and Mr. Towry appeared before Judge Fourt to sign the deposition, that is, for your client to sign, Judge Fourt said, "You are doing the correct thing by [74] making a true statement now," did he not?

A. Substantially that, yes.

Mr. Wynn: In substance. That's all.

Recross-Examination

By Mr. Heily:

Q. Mr. Towry told you at the time of taking the deposition he wanted to help the insurance company all he could, is that correct?

A. That is correct.

Mr. Heily: That's all.

The Court: May this witness be excused?

Mr. Heily: Yes, your Honor.

Mr. Wynn: Yes.

The Court: You may be excused.

(Witness excused.)

The Court: Now, can we get the clerk and see if we can get him excused this afternoon?

Mr. Wynn: We have one other person in connection with the deposition of Mr. Towry. The reporter is here who took that deposition, and I think there is no purpose in retaining him.

The Court: There is no insinuation that the reporter didn't transcribe the notes correctly? [75]

Mr. Wynn: No.

The Court: Counsel wants to know if you will enter a stipulation.

Mr. Wynn: That Mr. Van Vleck, the reporter, may be excused.

Mr. Heily: So stipulated.

The Court: You are not raising the issue that he couldn't read his notes?

Mr. Heily: No.

The Court: All right. You may be excused.

Mr. Heily: Mr. Peacock, please.

WILLIAM R. PEACOCK

recalled as a witness by and on behalf of the plaintiff having been heretofore duly sworn, resumed the stand and testified further as follows:

Direct Examination
(Continued)

By Mr. Heily:

Q. Did you just finish examining the instructions in the trial of this action in the state court?

(Testimony of William R. Peacock.)

A. Yes.

Q. You did complete your examination?

A. Yes.

Q. Did you find any that referred to intoxication? [76]

Mr. Wynn: I interpose the same objection, your Honor, I made originally.

The Court: Same ruling. I don't think it is proper to—well, I don't know. The complaint in this case did say something about intoxication. Objection overruled.

You can answer yes or no. Did you find some?

The Witness: I did and I didn't. It is there, but it is stricken out by the court.

Q. (By Mr. Heily): You say the intoxication is mentioned in the instruction but stricken by the court? A. Yes, sir.

Q. Are you acquainted with the handwriting of the judge that tried the case? A. I am.

Q. What is his name?

A. William A. Freeman.

Q. Were you clerking for him at the time he served as judge in Ventura County?

A. I was.

Q. That is how you became acquainted with his handwriting? A. It is.

Q. Is that his handwriting that the word "intoxication" is stricken out of the instruction with? Is it signed by him? [77]

A. The word "intoxication" has two lines drawn through it in ink and Judge Freeman's signature is

(Testimony of William R. Peacock.)

below. I would say it is the same ink. There is also another notation above in his handwriting.

Mr. Wynn: Just for the sake of the record, may I now move to strike the answer of the witness subject to the court's ruling as immaterial in this action?

The Court: The only thing I am trying to do is get the instruction identified.

Mr. Wynn: That is what I thought. Now we are reading something into the record.

The Court: I don't want it read. I want it identified so tomorrow I can make a ruling on the question of whether it is material. What is the number of that instruction?

The Witness: 14, your Honor.

The Court: Can you make a copy of that instruction and have it here?

Q. (By Mr. Heily): Was that instruction given to the jury, Mr. Peacock?

Mr. Wynn: I object to that as entirely immaterial in this action under the case of Valladao against Firemen's Fund Insurance Company. It has no bearing.

The Court: Does the instruction itself say whether it was given or refused?

Q. (By Mr. Heily): Does it? [78]

A. Yes, it does.

The Court: Then I will sustain the objection as the instruction itself is the best evidence. If you can get a copy of it, we will rule on all these matters at one time.

(Testimony of William R. Peacock.)

The Clerk: Should they be marked as Winget's exhibit for identification?

The Court: Yes.

Mr. Heily: That's all.

Cross-Examination

By Mr. Wynn:

Q. You have the file in the case of Winget vs. Towry?

A. I believe it was Delozier at that time.

Q. Delozier? A. Yes.

Q. Will you turn to the complaint in the action? This is the original file of the Superior Court of Ventura County? A. Yes, sir, it is.

Q. And this is the original complaint filed in the action? A. Yes.

Mr. Wynn: With the court's permission, I would like to read the counts 2 and 3 of the complaint. It should be before [79] the jury.

The Court: I have no objection to your reading those counts to the jury, but if you read those counts to the jury, I think the defendant should then have the right to establish the fact that he made a motion to dismiss which was denied. I understand that was the statement. I want all the facts to go to the jury. I don't want just part of the facts.

Mr. Wynn: I agree with you. I don't think that is pertinent in this action and I will withdraw the offer.

That's all.

(Testimony of William R. Peacock.)

The Court: Now are we going to get a copy of the complaint in this case that was filed?

Mr. Wynn: I think not, your Honor.

Mr. Heily: I have a copy, official copy, your Honor.

The Court: It would be fine if opposing counsel would stipulate that was a copy, but I don't want to excuse this witness and then tomorrow find out you can't establish it is the original or a certified copy.

The Witness: I will be glad to come back tomorrow.

The Court: Will you be in town tonight?

The Witness: No, but I only live 60 miles away and I would just as soon come back.

Mr. Heily: I have a completed copy of the complaint here. Will you stipulate this is a copy?

The Witness: We have a photostatic copy of the complaint [80] in the file.

Mr. Heily: I believe that is the complaint in the Winget action.

The Court: Can you stipulate that is a copy of the complaint?

Mr. Wynn: I have a photostatic copy. Counsel and I will stipulate. We will have no difficulty.

The Court: All right.

Mr. Heily: I now offer this for identification.

The Court: It may be received and marked Winget for identification.

The Clerk: So marked, Exhibit No. 3.

(The document referred to was marked Plaintiff Winget's Exhibit No. 3 for identification.)

The Court: Can this witness be excused?

Mr. Wynn: Yes.

Mr. Heily: Yes.

The Court: You may be excused.

(Witness excused.)

The Court: Now it is nearly 4:00 o'clock. I think we'd better take a recess until in the morning.

Ladies and gentlemen of the jury, again it is my duty to admonish you you are not to discuss this case with anyone, you are not to allow anyone to discuss it with you, [81] you are not to formulate or express any opinion as to the rights of the parties or you must not speculate as to any of the things that occurred in the court room today. The testimony you will consider is the testimony that will be given to you from the witness stand or by stipulation of counsel. It is very important that you do not discuss this case with your immediate family or your friends.

When this case has been finally submitted to you, you can discuss it and you can form an opinion. Until that time, you are not to discuss this case or you are not to formulate or express an opinion.

With that admonition, we will now recess until 10:00 o'clock in the morning.

Mr. Heily: May I request you to instruct witnesses that they are to return tomorrow?

The Court: All witnesses who have not been excused in this case, including Mr. Mack, will return to this department tomorrow at 10:00 o'clock without any further notice.

(Thereupon, an adjournment was taken until 10:00 o'clock a.m., March 28, 1951.) [82]

March 28, 1951, 10:00 A.M.

The Clerk: No. 12327-HW Civil, Winget vs. Standard Accident Insurance Company of Detroit for further jury trial.

Mr. Heily: Ready for the plaintiff.

Mr. Wynn: Ready for the defendant.

The Court: Is it stipulated the jury is present and in the box?

Mr. Heily: So stipulated.

Mr. Wynn: So stipulated.

The Court: You may proceed.

Mr. Wynn: If the Court please, ladies and gentlemen of the jury, there have been interludes, as you may recall, since the witness I was examining, Mr. Medlen, was last on the stand. At the time he was under examination, a document was admitted in evidence as Defendant's Exhibit E. I will ask the court for permission at this time to read that document to the jury.

The Court: It may be read.

Mr. Wynn: Perhaps it would be well for Mr. Medlen to take the stand again. He was under examination.

The Court: All right. [84]

JOHN WILLIAM MEDLEN

recalled as a witness herein, having been heretofore duly sworn, was examined and testified further as follows:

Mr. Wynn: I am now reading the legend, Defendant's Exhibit E, which is dated July 11, 1949.

"My name is Billy Ray Towry, age 22. I live with my wife, Helen, at 11-18 Alameda Dr., Oxnard, Calif. My wife is the former Helen DeLozier. I am employed by the Associated Oil Co., 164 W. Santa Clara St., Ventura, Calif.

"On the afternoon of Jan. 26, 1949, some time between 3:00 and 4:00 p.m., my brother-in-law, Thomas Mack, and my sister came to my mother's place at 120 E. Ramona St., in Ventura. At that time this was also my home. From that time until about 5:00 p.m., we just chatted. At about 5:00 p.m., Tom and I got into my 1948 Chevrolet sedan to drive to the DeLozier home, located on the outskirts of Oxnard, to as Helen and Vivian DeLozier to have dinner at Tom's home. We drove directly to the DeLozier home on Beach Road, which is about 4 miles west of Oxnard. When we arrived, Mrs. DeLozier told us that the girls were in Oxnard. We then drove into Oxnard to try to find them, we did find them at the bus stop. [85]

"The four of us then started for the DeLozier home. Before we left Oxnard, Tom wanted to stop at a Bonding Co. to try to arrange to obtain a bond that he said was necessary for a job

(Testimony of John William Medlen.)

he was trying to get. We did this and I understand he was not successful. We drove to the DeLozier home and waited while the two girls changed clothes. At about 6:00 p.m., we started back toward Ventura. The weather was clear and dry and it was not dark enough to require headlights. Tom was in the front seat with me and the two girls were in the back. We were driving east on W. 5th St. at a speed of about 55 m.p.h. The road is a two-laned concrete road about 18 feet wide, with wide dirt shoulders on either side. At a point about 2 miles west of Oxnard I saw a hole ahead of me in the concrete. The hole was located about in the center of the road and appeared to be about 2 feet wide. It was though the top one or two inches of the concrete had been knocked or chipped out. I turned my car to the right to go around the hole and at that time the two right wheels of the car left the pavement and dug into the soft shoulder.

"When I returned to the scene of the accident [86] several days later my tire marks were still there and I saw that the tires had sunk into the soft dirt to depth of about 3 inches. The road is about 2 inches higher than the dirt shoulders. The car started to weave slightly and I then applied my brakes and at the same time turned to get back on the road. The car did turn back on the road very suddenly and I lost control swinging clear across the road, across

(Testimony of John William Medlen.)

the dirt shoulder on the other side and ended up in the ditch on the north side of the road. I was knocked unconscious. The next thing I remember there were two California Highway Patrolmen at the scene. Helen and I were loaded into the police car and taken to the Lying-In Hospital in Oxnard. None of us had any intoxicating liquor to drink. No one paid or offered to pay me for any part of the ride. To the best of my knowledge, no one asked me to slow down or in any way cautioned me about my driving. I say, to the best of my knowledge, because my wife Helen has since told me that her sister, Vivian, said on the way to the DeLozier home—'Hey Bill take it easy.' Helen says this was said laughingly just after I had rounded a corner. Thomas Mack had ridden with me on several occasions prior to this date and several [87] times since the accident and has never complained about my driving. The California Highway Patrol, who investigated this accident, did not cite me for any violation.

"I have read the above statement of approx. 1¾ pages and it is true to the best of my knowledge. B.R.T. (signed)

Signed "BILLY RAY TOWRY."

(Testimony of John William Medlen.)

Direct Examination
(Continued)

By Mr. Wynn:

Q. Now, Mr. Medlen, the statement I just read to the jury, you obtained on or about July 11, 1949?

A. That is correct.

Q. Had you had any conversations with Mr. Towry prior to that time concerning the happening of the accident, other than you have related in your testimony? A. I don't recall any.

Q. Had you had any conversations with either the plaintiff Vivian Delozier, now Vivian Winget, or the plaintiff Thomas Mack, prior to this time in July, 1949?

A. I don't believe I talked to the plaintiff Vivian Delozier. As I recall, her memory was gone at the time. She had no recollection of it. I don't know whether I learned that prior to that or afterwards. I did talk to Mr. Mack [88] about the first part of April, 1949.

Q. Where did that conversation take place?

A. That was at Mr. Mack's home. I think it was two or three doors down from the Towry residence.

Q. They lived on the same street?

A. They lived on the same street, yes, sir.

Q. To your knowledge, were they related at the time you talked to Mr. Mack?

A. Mrs. Mack was Mr. Towry's sister. He was his brother-in-law.

Q. Who was present at the conversation?

(Testimony of John William Medlen.)

A. Just Mr. and Mrs. Mack.

Q. Will you relate *not* the substance of the conversation which occurred at that time?

A. Well, I went out there for two purposes. One, a medical payment feature, and also an answer to a form questionnaire or statement that Mr. Mack had returned to my office. This statement consisted of the nature of his injuries, who were his doctors, his hospitalization, and the purpose of the trip, and then describing the accident.

Under the description of accident, I recall that there was written, "Not gross negligence. You guys find out the rest."

So I questioned Mr. Mack about this, and I recall him saying something to the effect that, "Well, I must have [89] been very angry at that time or upset," or something to that effect.

Q. Did you have any conversation with Mr. Mack at that time as to whether any of the parties, and specifically Mr. Towry, had been drinking anything during the day?

A. Yes. I believe Mr. Mack told me that there was no drinking involved.

Q. This occurred about April 1949, is that right?

A. Some time the first part of April, yes, sir.

Q. Then was the next conversation you had with either Mr. Towry or any of the plaintiffs-claimants in this action July of 1949?

A. No. I believe I talked to Mr. Mack probably two months later at the Towry home on Ramona.

(Testimony of John William Medlen.)

Q. Did that conversation relate to the occurrence of the accident?

A. No, merely to the medical bills that had been submitted for his injuries.

Q. When was the next conversation you had with either of the parties to this action or, I should say, with either Mr. Mack or with Vivian Delozier Winget? When was the next conversation after the July conversation?

A. I don't believe I talked to Mr. Mack again. I talked to Vivian Delozier or Vivian Winget at the home of her parents in Oxnard, and at that time I recall that her memory [90] was still a complete blank as to how the accident occurred.

Q. Then subsequently did you talk to Mr. Towry again? A. Yes, I did.

Q. When was that?

A. That was either in the evening of November 30th or December 1st.

Q. Of the year—— A. 1949.

Q. Where did the conversation take place?

A. That was at the home of Mr. Towry's parents.

Q. What time of the day was that?

A. I believe it was early evening. I think he had just got home from work, and I am quite certain I was waiting for him when he did get to his parents' home.

Q. Who was present at the conversation, either participating in it or close enough to overhear what was said?

A. Mr. and Mrs. Towry, the parents.

(Testimony of John William Medlen.)

Q. Did you state to Mr. Towry at that time the purpose of your call? A. I did.

Q. What did you say to him?

A. I told him that I had received a communication from my office and after reviewing the depositions of Mr. Mack and Mr. Towry, that it was obvious someone was lying. [91]

Q. In what respect?

A. In the question of drinking. I believe Mr. Mack testified there had been drinking and Mr. Towry denied there had been drinking in the deposition.

Q. What was said by Mr. Towry, in substance?

A. Of course, I went out there to try to get the truth, and if it was the truth, to make sure he was telling us the truth, and he remarked at that time, "Well, if I change this story, you guys might dump that back in my lap."

I said, "That is a decision for the company to make. I cannot say. I don't believe they will."

And then he went ahead to relate he had been in either three cocktail bars or beer places and he had been drinking.

Q. Did anything further occur at that conversation? Was anything further said by any of the parties in substance that you have not yet related?

A. I don't recall anything, sir.

Q. You passed on the information you obtained in the regular course of your business?

A. That is correct.

(Testimony of John William Medlen.)

Q. Have you had any further dealings with Mr. Towry in connection with this case?

A. I saw him next, I think, about a week ago.

Q. At my request? [92]

A. That is correct, sir.

Q. And that was in connection with Mr. Towry's being requested to appear in this court room?

A. That is correct.

Q. You had no conversation with him at that time concerning the events surrounding the accident?

A. No. The only thing we said is we both hoped it would be over with before long.

Mr. Wynn: That's all. Cross-examine.

Cross-Examination

By Mr. Heily:

Q. You talked to Mr. Mack in the first part of April 1949, is that correct?

A. That is correct.

Q. At that time, he told you that there had been no drinking of beer involved?

A. To the best of my recollection, that is correct.

Q. You are quite positive of that?

A. No, I say that was to the best of my knowledge. I am relatively certain, but I cannot make a definite statement he did tell me there was no drinking.

Q. Did you have a suspicion that there had been drinking at that time?

A. No. I asked that question always to pas-

(Testimony of John William Medlen.)

sengers in [93] a car under the guest statute of California, as to whether or not there was any drinking or wilful misconduct.

Q. You just asked him the one question, "Was there any drinking"?

A. I think I also asked if there was any payment for the transportation.

Q. Concerning the drinking, you just asked the one question, "Had there been any drinking?"

A. I believe so.

Q. And he said "No"?

A. That's right, to the best of my knowledge. I want to qualify it that way.

Q. When did you first obtain any knowledge that there had been some drinking?

A. When Mr. Towry told me on either the evening of November 30th or the evening of December 1st, 1949.

Q. That is the first time?

A. That is the first time.

Q. When did you get the depositions back to read?

A. I have never read the depositions. I have never seen them.

Q. You told us you went to Mr. Towry's home on December 1st, approximately, and you told him that the depositions indicated that there had been drinking.

A. Mr. Mack's deposition indicated there had. I had [94] received a brief letter, you might say a resume of the depositions.

(Testimony of John William Medlen.)

Q. When did you receive that letter?

A. I believe it is dated November 8th, so I assume I received it in my office probably two or three days later than Novemer 8, 1949.

Q. About November 10, 1949, you had some indication, didn't you, that there had been some drinking?

A. At least Mr. Mack was contending that.

Q. That was the first indication you had had?

A. That's right.

Q. Then you waited until about the 30th of November or 1st of December to go and see Mr. Towry?

A. I don't know whether you would call it waiting, or waiting to take a statement. I believe Mr. Towry was then and still is working out in the oil fields.

Q. In your conversation in the home of Mr. Towry when his parents were present, do you remember saying words to this effect to Mr. Towry about this drinking: "We'd better keep this quiet"?

A. I certainly do not.

Q. You didn't say that? A. No.

Q. You are positive of that?

A. I am positive of that. [95]

Q. When you asked Mr. Towry at that time whether he had been drinking, he said yes, he had been drinking some beer?

A. Not quite as soon as that. It was after some conversation.

(Testimony of John William Medlen.)

Q. He told you, though, he had been drinking some beer? A. That's right.

Q. He didn't say anything about intoxicating liquor. He said beer, didn't he?

A. I believe that is correct.

Q. And that's all he said he had been drinking?

A. I believe that is correct.

Q. Throughout your dealings with Mr. Towry after these actions were filed against him, you noticed, didn't you, that he was very disturbed and very angry that the actions had been filed against him, didn't you?

Mr. Wynn: Just a moment. That calls obviously for an opinion or conclusion of this witness, as to whether he was disturbed or angry.

Mr. Heily: I will withdraw the question. I think that is correct.

Q. Did Mr. Towry ever say anything to you about how he felt concerning the bringing of these actions against him? [96]

A. I don't recall any definite words. I rather imagine, of course, he was quite disappointed that his in-laws had filed such an action against him.

Mr. Heily: I believe that's all.

Mr. Wynn: No further questions. You may step down.

(Witness excused.)

Mr. Wynn: I will call Mr. Towry.

BILLY R. TOWRY

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you be seated, please, and state your name?

The Witness: Billy R. Towry.

Direct Examination

By Mr. Wynn:

Q. Mr. Towry, you were the defendant in actions filed against you in the Superior Court of Ventura County arising out of an automobile accident, were you? A. I was.

Q. And the plaintiffs in those actions were Vivian Delozier and Thomas Mack? [97]

A. They were.

Q. At the time of the accident, were these parties related to you in any way?

A. Thomas Mack was the only one.

Q. What was his relationship to you?

A. Brother-in-law.

Q. Subsequently, you became related with the plaintiff Vivian Delozier, now Vivian Winget?

A. Yes.

Q. What is the nature of that relationship?

A. Sister-in-law.

Q. What was the date of the accident giving rise to these actions, do you recall.

A. I don't recall the exact date, no.

Q. Some time in January, 1949?

(Testimony of Billy R. Towry.)

A. That was the accident?

Q. Yes. A. But not the——

Q. The lawsuit.

A. The lawsuit, that was later on.

Q. The accident occurred some time in January 1949 and the suits were not filed until a number of months later, is that right? A. Yes, correct.

Q. Shortly after the occurrence of the accident, do [98] you recall making a written report of the occurrence to your insurance company?

A. I did not make the report.

Q. I show you a document, which has been marked Defendant's Exhibit D for identification, and ask whether you have seen that document or the original of which this purports to be a copy before? Examine both sides, if you will.

A. I signed them from the Automobile Club. He fixed it up and brought them down to me to sign them.

Q. And then I take it this appears to be a carbon copy of your signature in the lower right-hand corner? A. Yes, it is.

Q. On the reverse side of the document?

A. It is.

Q. That was prepared for you and you signed it, is that right? A. Yes.

Q. It appears from figures I see in the lower left-hand corner, 1/28/49, possibly the date of January 28, 1949, was indicated. Does that refresh your recollection as to when you signed it?

A. January 28th, it was about that time, yes.

Mr. Wynn: We offer this document as defend-

(Testimony of Billy R. Towry.)

ant's exhibit next in order, having been marked only for identification. [99]

Mr. Heily: May I question the witness on voir dire before the offer is ruled on?

The Court: You may.

Voir Dire Examination

By Mr. Heily:

Q. Now, Mr. Towry, where were you when this statement was presented to you to sign?

A. I was in the hospital, Lying-In Hospital in Oxnard.

Q. What was your condition of health?

A. I don't remember signing it. This guy brought it in from the Automobile Club, and I recognized him. That is when I signed the document.

Q. Were you in the hospital for what injury?

A. I had a cut on my eye——

Q. The accident was January 26?

A. January 26.

Q. And this was the 28th when he came in to see you? A. It was.

Q. At that time, did he hand you the document for reading?

A. No, I did not read it. [100]

Q. You did not read it?

A. He said it has to be in Sacramento within 10 days after the accident, and he was from the Automobile Club, so he filled it out and I signed it.

Q. He filled it out and you signed it without reading it? A. I did not read it.

(Testimony of Billy R. Towry.)

The Court: May I ask a question? Was it read to you?

The Witness: No, sir.

Q. (By Mr. Heily): Do you recall anything that was stated in it, or have you ever read it?

A. No, sir, I have never read it.

Q. You don't know anything that is in it?

A. I don't know.

Mr. Heily: I will object to the admission, your Honor, under the circumstances. No proper foundation.

Mr. Wynn: The foundation is there. The person has signed the document.

The Court: Supposing he says he has never read it, it was not read to him, he was in the hospital and somebody came in and presented it to him and asked him to sign it? Do you think he is bound by the contents of the document?

Mr. Wynn: I think he is bound by it. He is a man over the age of 21 years. [101]

The Court: I will sustain the objection.

Direct Examination
(Resumed)

By Mr. Wynn:

Q. Mr. Towry, before the occasion on which you affixed your signature to the document, had you talked with any representative of the Auto Club concerning the accident? A. No.

Q. This person you spoke of as one you recognized from the Auto Club, what was his name?

(Testimony of Billy R. Towry.)

A. Kenneth Fraser.

Q. You had known him for some period of time?

A. I had.

Q. Long prior to the accident?

A. That's right. I had insurance with the Auto Club and he had taken care of anything I had through the Auto Club. I would always go to him.

Q. When did Mr. Fraser first discuss this accident with you as to the time of the occurence, or anything in connection with it?

A. I don't believe he obtained the information from me.

The Court: That is not the question. The question is when did you first discuss the accident with him, Mr. Fraser, either before you were in the hospital or after you were in [102] the hospital?

The Witness: I believe it was after I was out of the hospital.

Q. (By Mr. Wynn): But you saw Mr. Fraser in the hospital on at least one occasion?

A. Yes, sir.

Q. Was there more than one occasion you saw him in the hospital?

A. I don't recall. Just the once.

Q. When he came to the hospital, did he talk with you before you signed the document?

A. No. He, I think, already had it filled out and he says he had to have this signed to get it into Sacramento within a certain length of time, and he said it would require my signature to be in and I signed it for him.

(Testimony of Billy R. Towry.)

Q. Did you inspect the document as to the description of the car involved? A. No, I *did*.

Q. Did you inspect it as to whether it reported any injuries to any persons? A. No, I didn't.

Q. Did you discuss the contents of the document with anybody before signing it? A. No.

Q. Did you discuss the occurrence of this accident [103] with Mr. Mack before signing the document? A. No.

Q. When did you first discuss the facts of the accident with Mr. Mack?

A. Oh, it must have been approximately four or five days after the accident, I imagine.

Q. Were you still in the hospital then?

A. I was.

Q. Do you wish this jury to understand that you did not read any portion of the document which I have handed to you before signing it?

Mr. Heily: Object to that on the ground that what he wishes is not important to this case.

The Court: Sustained.

Q. (By Mr. Wynn): Is it presently your testimony that you did not read one word of the typewritten matter contained on the document which I have presented to you for examination before signing it? A. I didn't read it, no.

Q. You read no portion of it?

A. Not to my knowledge.

Q. When you say not to your knowledge, you mean your present recollection, is that right, is neither one way or another?

(Testimony of Billy R. Towry.)

A. No, sir. I couldn't tell you what was on the document, [104] one word, I couldn't tell you what was on it.

Q. Do you mean you don't know at present whether you read one word or not?

A. I didn't.

Q. You are positive you didn't?

A. Positive.

Q. Was the signature, the name of Mr. Fraser, on the document at the time you signed it?

A. Just on here just now is the only time I saw it.

Q. Was that signed in your presence?

A. I don't believe it was signed. It was just typewritten on the bottom there when I looked at the date just now.

Q. You looked at the date and you found the date, apparently, to be handwritten, did you?

A. Yes, I did.

Q. Do you know who placed this date on the document shown as the figures 1/28/49?

A. No, sir, I do not know.

Q. Do you know who wrote the other number below it?

A. No, sir, I don't. That isn't my writing.

Q. I say appearing above your signature——

Mr. Heily: I am going to object to any statements taken [105] out of the document as not properly in evidence.

The Court: I don't know whether you have a

(Testimony of Billy R. Towry.)

right to cross-examine this witness on that. He is your witness.

Mr. Wynn: That is true. I am examining as to something which appears here as to when he did it.

The Court: You are cross-examining, as far as I am able to ascertain. Of course, no objection is raised.

Mr. Heily: I will object to the fact that he is cross-examining his own witness.

The Court: I don't think you are entitled to read to the jury anything that is in the document.

Mr. Wynn: I don't intend to, your Honor.

Q. Did you place any writing or did you depict anything on this document before you other than the signature which you have identified?

A. No, sir.

Q. That question is clear?

A. He put the cross on there and I signed.

Q. My question was clear, you did not put anything else on this document? A. No, sir.

The Court: May I ask a question? The only thing you signed was your name?

The Witness: Yes, sir, that is all.

Q. (By Mr. Wynn): After this occasion in January 1949, [106] did you later make any statements concerning the facts surrounding the accident to anyone acting on behalf of your insurance company? A. I don't recall.

Mr. Heily: Do you understand the question.

The Witness: No, I don't understand the question.

(Testimony of Billy R. Towry.)

Q. (By Mr. Wynn): You recall, do you, that some time after the statement or the report of January 1949, you had some conversation with some representative of the insurance company?

A. Yes, sir.

Q. About when was that next conversation?

A. I think I went into Mr. Fraser's office and talked to him after the accident.

Q. And when was that?

A. Oh, approximately two weeks after the accident.

Q. Then subsequently did you meet Mr. Medlen in connection with the accident?

A. Yes, I did.

Q. And you recognize Mr. Medlen seated at the counsel table? A. I do.

Q. When did you first meet him?

A. It was in Mr. Fraser's office in the Auto Club in Ventura, I believe. [107]

Q. Did you have a conversation with Mr. Medlen in Mr. Fraser's presence?

A. I am not sure. We probably had conversation, introduction, everything. I don't recall the conversation.

Q. But this date approximately two weeks after the accident is the first one you recall?

A. Yes, sir.

Q. At that time did you examine a copy of the "Assured's Report" that you made on January 28 of 1949?

(Testimony of Billy R. Towry.)

A. You mean renew the insurance? Or what do you mean on that?

Q. I was directing your attention to the document you have inspected.

A. No, I did not read that.

Q. At that time? A. No, sir.

Q. What was the substance of the conversation at that meeting in Santa Barbara?

Mr. Heily: In where?

Q. (By Mr. Wynn): I thought you said Santa Barbara. Am I incorrect?

A. No, sir. Ventura.

Q. Ventura. I am sorry.

A. I went to see Mr. Fraser on several occasions on my car. He had my car towed to Los Angeles for repairs, and [108] that was probably the conversation. I don't recall, but I saw him on several occasions for that purpose.

Q. Do you recall on or about July 11, 1949, having a conversation with Mr. Medlen in your home?

A. I do.

Q. Who was present at that time?

A. My wife.

Q. Did she participate in the conversation?

A. No.

Q. Can you state in substance what was said now by Mr. Medlen and what was said by yourself at that time?

A. No, I don't recall. I don't recall the conversation.

(Testimony of Billy R. Towry.)

Q. But you do recall making some statements to him? A. I do.

Q. And subsequently did Mr. Medlen hand to you a statement purporting to be the substance of what information you gave on that occasion?

A. Yes, he did.

Q. I show you a document dated July 11, 1949, consisting of two typewritten pages, which is in evidence as Defendant's Exhibit E, and ask you if you have ever seen that document before?

A. Yes, I saw it. [109]

Q. Directing your attention to the initials B.R.T. appearing on the first page did you affix your initials there? A. Yes, I did.

Q. And likewise the initials B.R.T. on the second page? A. I did.

Q. And the signature "Billy Ray Towry" is yours? A. Yes.

Q. At the time you signed that statement, you read it, did you?

A. Well, yes, I did. I was asleep when he came there. I was working the morning tour in the oil fields, and my wife came in and woke me up and she said, "Mr. Medlen is here. He would like to talk to you." And so that is when I had to sign those.

Q. Do I understand, Mr. Towry, that Mr. Medlen called at your home only once in connection with your signing this statement?

A. Well, I don't recall that. I don't know if it was once or twice.

(Testimony of Billy R. Towry.)

Q. He didn't have a typewriter with him, did he, when he called? A. No.

Q. You do recall an occasion when he handed you a [110] document which you did then read and sign?

A. Yes, sir.

Q. Do you recall subsequently giving your depositions in the actions pending in Ventura County?

A. Yes, sir.

Q. That was on or about October 28, 1949?

A. Approximately.

Q. Did you later have an opportunity to read a transcript of the deposition given by you?

A. I did.

Q. When did you read it?

A. I don't know the exact date on that. Probably, maybe, two months later.

Q. Can you fix it as before or after the holiday season in 1949, after the first of the year?

A. I believe it was after the first of the year, yes.

Q. What was the occasion of your reading the deposition?

A. Well, let's see. I don't recall the first time I read it, even.

Q. Do you recall receiving in the mail some time in March of 1950 a notice from the insurance company? A. I did.

Q. You have been directed by subpoena duces tecum to [111] produce that in court. Do you have that with you?

(Testimony of Billy R. Towry.)

A. No. I have it in my car. I can bring it in during recess.

Q. It is available? A. It is available, yes.

Mr. Wynn: With the court's permission, we will pass that so you can get it later.

The Court: All right. We will take a recess in a few minutes and you can get it during the recess.

Q. (By Mr. Wynn): The notice which I have referred to, and which I will shortly present to you, or a copy, was received some time, to the best of your recollection, in March 1950?

A. Yes, it was.

Q. And that notice was received after the time that you had given your deposition in the case, was it not? A. It was.

Q. Was it received by you before the time you had first read a transcript of the deposition?

A. Let's see, now. I don't recall if it was or not.

Q. Mr. Towry, after receipt of this document, which you can produce after recess, can you not?

A. Yes.

Q. After receipt of that document, did you consult with Mr. Willard, an attorney, concerning the case? [112] A. I did.

Q. In your consultation with Mr. Willard, did you have a transcript of the deposition given by you? A. Yes.

Q. Approximately when was it you conferred with Mr. Willard?

A. Well, let's see. I had talked to Mr. Willard before I received this document that you sent.

(Testimony of Billy R. Towry.)

Q. Before you received the notice from the insurance company? A. Yes.

Q. At that time did you discuss with Mr. Willard your testimony given in the deposition?

A. I did.

Q. And did you have a copy of the transcript of that testimony at the time you first talked to Mr. Willard? A. Yes.

Q. So your first conversation with Mr. Willard was then before receipt of this letter of March 1950, and after what date? In other words, I am trying to say, was it after the first of the year you first talked to Mr. Willard?

A. Yes, it was after the first of the year. It was between March 13th and March 20th, along about that. On March 13th the letter was dated for the notice of withdrawal, which was the following Monday, would be the 20th. In the meantime, I hadn't received the letter, and he went to court for me and they couldn't get the motion for withdrawal through the court, because the letter was not properly sent. It hadn't had enough time to reach me for the court.

Q. So, as I understand it, and I don't want to be misleading, but only to be correct, you first discussed the matter of the testimony you gave in your deposition with Mr. Willard along about the 13th of March 1950? A. Yes, sir.

Q. Do you recall a conversation with Mr. Medlen in your home on or about November 30, 1949, or December 1, 1949? A. Yes, I believe I do.

Q. Do you recall that Mr. Medlen at that time

(Testimony of Billy R. Towry.)

told you that apparently someone was lying in connection with——

Mr. Heily: I object to this as leading.

The Court: What is the objection?

Mr. Heily: That it is leading, your Honor.

The Court: I think it is leading.

Q. (By Mr. Wynn): What conversation did you have with Mr. Medlen on that occasion? First, will you tell us who was present other than yourself and Mr. Medlen?

A. My mother and father were present, but my father, he doesn't hear very well, so he wasn't listening to the conversation.

Q. What did Mr. Medlen say to you in substance at [114] that time?

A. Well, he says that the deposition we had made the month before, there was mistakes in them some way and he wanted to straighten them out, that he was there to help me and not against me.

Q. What did he tell you, if anything, as to what you have referred to as the mistakes?

A. Yes, he mentioned drinking in there.

Q. What did you tell Mr. Medlen?

A. I told him I had.

Q. Did you say anything else? A. No, sir.

Q. Did Mr. Medlen say anything?

A. He just said he wanted to get it all straightened out before court, that the deposition was incorrect on my part and he was going to help me, not against me on it.

Q. Following that conversation, your next deal-

(Testimony of Billy R. Towry.)

ing with the insurance company was when you received a letter from them, is that right, in March of 1950?

A. Yes, I believe it was. I am not too certain about that.

Q. Then upon receipt of the letter in March, 1950, you consulted Mr. Willard, is that right?

A. Yes.

Q. And in the course of your dealings with [115] Mr. Willard, you made corrections upon the original deposition given by you, did you?

A. I did.

Q. And those corrections were made, to the best of your recollection, about what date?

A. It was about the—approximately the 18th to the 20th, approximately.

Mr. Wynn: I believe I have no further questions, your Honor, with one exception. I want permission to introduce the original document we have referred to after the recess.

The Court: Maybe it will be stipulated the copy can be introduced. I don't know. Do you have any objection?

Mr. Heily: I will have an objection to it, your Honor.

The Court: You will?

Mr. Heily: Yes.

The Court: All right. You can present it after the recess.

Mr. Heily: Do you wish me to start my cross-examination now?

(Testimony of Billy R. Towry.)

The Court: Well, maybe we'd better take our morning recess now.

Ladies and gentlemen of the jury, we are about to take another recess. Again it is my duty to admonish you you are not to discuss this case with anyone, not to allow anyone [116] to discuss it with you, you are not to formulate or express any opinion as to the rights of the parties until this case has been finally submitted to you.

With that admonition, we will now recess until 10 minutes after 11:00.

(Recess.)

The Court: Before cross-examination, maybe you'd better introduce the document.

Mr. Wynn: Yes.

The Court: Is it stipulated the jury is present and in the box?

Mr. Wynn: So stipulated.

Mr. Heily: So stipulated.

Q. (By Mr. Wynn): Mr. Towry, you have now produced a letter which you received from the Standard Accident Insurance Company, have you?

A. I have.

Q. That is a letter bearing date March 13, 1950, consisting of two pages, and appearing to be signed by H. T. Ellerby? A. Right.

Q. You received that letter in the mail shortly after the date of March 13, 1950? A. Yes.

Mr. Wynn: We offer this in evidence as defendant's exhibit [117] next in order, if the court please.

(Testimony of Billy R. Towry.)

Mr. Heily: To which I object, your Honor, on the ground that the letter contains self-serving declarations and statements that have been denied admission into evidence already, and for the purpose of facilitating the trial, I am willing to stipulate that the letter denies liability to this assured, but so far as it being pertinent or material to any other issue in the case, it is entirely immaterial.

The Court: May I look at the letter? Mark it for identification first.

The Clerk: Defendant's Exhibit F for identification, your Honor.

(The document referred to was marked Defendant's Exhibit F for identification.)

The Court: I think the letter is objectionable because of the detail it goes into. I think the first two paragraphs are admissible, and also the last half of the next to the last paragraph and the last paragraph.

Mr. Wynn: Would you indicate again, your Honor, what that was? The first two paragraphs?

The Court: Yes.

Mr. Wynn: That would be ending with the quoted phrase?

The Court: With the quoted phrase. Then on the next page, five lines down, "The company further takes the position." [118]

Mr. Wynn: Through the remainder?

The Court: The rest of that, I think, is satisfactory. I will allow those portions of the letter

(Testimony of Billy R. Towry.)

to be introduced in evidence and read to the jury. The other portions I will not allow to be introduced in evidence and read to the jury. The letter cannot be shown to the jury by counsel, but you can read the portion indicated.

Mr. Wynn: Yes. I will read that at the present time with the court's permission.

Ladies and gentlemen, I am reading from a document which has been admitted in evidence in part as Defendant's Exhibit F, reading as follows:

Mr. Heily: May I interject just a moment? I believe you said, your Honor, the first two paragraphs.

The Court: Yes.

Mr. Wynn: Perhaps we should approach the bench.

The Court: All right.

(The following proceedings were had at the bench outside the hearing of the jury:

The Court: My ruling is down this far only, the first two paragraphs, and then beginning over here with "The company further takes the position."

(The following proceedings were had in the hearing and [119] presence of the jury:)

Mr. Wynn: The letter is addressed to Mr. Billy Towry.

"Dear Mr. Towry:

"On February 10, 1948, the Standard Accident Insurance Company issued to you its pol-

(Testimony of Billy R. Towry.)

icy of Automobile Liability Insurance No. J894065, covering a certain 1948 Chevrolet 4-door Sedan for certain bodily injury and medical payments limits for a period of one year. The policy provided, among other things, under Condition 8:

" 'Assistance and Cooperation of the Insured —Coverage A . . . The insured shall cooperate with the company and, upon the company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits.' "

"* * *

"The company further takes the position that by virtue of your false testimony that you have failed to cooperate with the company as required by the terms thereof and as set forth above. You are advised that the company hereby disclaims any and all liability under its contract [120] by virtue of your breach thereof, to indemnify you for any loss arising out of any claims or law suits brought because of said accident, and further, denies any obligation to defend such law suits and further, denies any obligation or duty under said contract arising out of said accident or inuries to any person sustained therein.

"The company's attorneys, Bauder, Gilbert, Thompson, Kelly & Veatch, have been in-

(Testimony of Billy R. Towry.)

structed to withdraw as your attorneys of record in the defense of said actions, and you are advised to make arrangements with other counsel to carry on your defense if you so desire."

No further questions.

Cross-Examination

By Mr. Heily:

Q. Mr. Towry, I hand you this statement you signed in July, Defendant's Exhibit E, and direct your attention to the phrase contained therein, "None of us had any intoxicating liquor to drink."

Now, Mr. Towry, what did you mean by making this statement?

Mr. Wynn: Just a moment. That calls for a conclusion of this witness. The document speaks for itself. His translation [121] is not admissible in evidence.

Mr. Heily: Withdraw it.

The Court: It has been withdrawn.

Q. (By Mr. Heily): What was your understanding at that time of the words "intoxicating liquor"?

A. Hard liquor.

Q. Would that include beer?

A. Not including beer.

Q. Since that time, have you ascertained that the words "intoxicating liquor" include beer?

A. Yes, I understand now.

Q. Now, at the time you had this deposition

(Testimony of Billy R. Towry.)

taken in October of 1949, had you been notified to be present at Mr. Hollingsworth's office?

A. Yes.

Q. Who had notified you?

A. I am not certain who notified me on that.

Q. Was it Mr. Thompson, the insurance company attorney? A. No.

Q. You don't recall?

A. It was not Mr. Thompson.

Q. Was it Mr. Veatch?

A. Veatch is the name.

Q. Did you arrive at Mr. Hollingsworth's office at [122] the appointed time? A. I did.

Q. Did you see Mr. Veatch there?

A. I did.

Q. Did he talk to you about the facts of this accident in any way, in any particular?

A. No. He introduced himself to me and he said, "It will be a little while before the depositions are taken." He explained there would be depositions taken there, but he didn't say of what.

Q. Is that the substance of his conversation with you before taking the deposition? A. Yes, sir.

Q. Did he explain to you anything about what the deposition was? A. No, sir.

Q. Did he instruct you on what the effect of taking a deposition was?

A. No, sir, he didn't explain to me.

Q. He didn't explain to you about what a deposition was? A. No, sir.

The Court: May I ask a question?

(Testimony of Billy R. Towry.)

Did you ever have a deposition taken before?

The Witness: No, sir. [123]

Mr. Heily: That was to be my next question, your Honor.

Q. When you did sit down to have your deposition taken, do you remember who all was present?

A. I can tell you as many as I know I remember being there.

Q. All right.

A. Mr. Henderson, Mr. Hollingsworth.

Q. They were attorneys for Mr. Mack?

A. That's right. And Mack himself, Vivian Delozier, and you were there, and I believe the court reporter was there.

Q. The court reporter was there, too?

A. Yes.

Q. And Mr. Veatch?

A. And Mr. Veatch, yes, sir.

Q. He was representing you, is that right?

A. Well, yes.

Q. And I was representing Vivian Delozier, now Vivian Winget? A. Right, yes, sir.

Q. And Vivian's father was there, was he?

A. Yes, he was there.

Q. At that time, Mr. Towry, were there strained relations between you and your father-in-law and Vivian? [124] A. Well, yes, sir.

Mr. Wynn: I think that is immaterial in the first place, if the court please, and in the second place, it calls again for an opinion and conclusion.

(Testimony of Billy R. Towry.)

The Court: Sustained upon the ground it calls for a conclusion.

Mr. Heily: I think that's right. The first ground isn't right, though.

Q. What was your feeling, Mr. Towry, when these actions were filed against you insofar as your in-laws were concerned?

Mr. Wynn: I think that is inadmissible on both grounds previously raised. It calls for his feeling.

The Court: Well, the only issue in this case is whether or not this witness cooperated with the insurance company.

Mr. Heily: Your Honor, may I point out the reason behind that? He has brought into evidence the fact that Mr. Towry was related to Vivian Winget, and he has brought out the fact that Mr. Mack was his brother-in-law, I believe, and I think the implication he is trying to get is something that the relatives were cooperating to beat the insurance company, and I am merely now trying to show that is not the case.

The Court: Of course, the question here is whether or not this witness cooperated. That may be a question of state of mind and intent. [125]

Mr. Heily: It goes to the weight, possibly.

The Court: Objection overruled.

Q. (By Mr. Heily): You tell us, Mr. Towry, how you felt about these actions being brought against you.

A. Well, I didn't like it when I heard about it.

(Testimony of Billy R. Towry.)

I knew there would be nothing but trouble, and there was trouble back and forth on the deal.

Q. What do you mean by "trouble"?

A. I mean we didn't get along too well on my wife's part and I. We didn't get along too well.

Q. Your wife is the sister of Vivian?

A. That's right. I couldn't think hard of my wife's sister, because it was her sister.

Q. You and your wife had a number of quarrels, is that right? A. That's right.

Q. How about your father-in-law?

A. We also had quarrels.

Q. Now, then, when you were asked this question in the deposition, "Did you have any intoxicating liquors," at that time did you still have the same understanding that you had in July regarding the meaning of intoxicating liquors?

A. Yes, I did.

Mr. Wynn: Just a moment. I think probably the deposition should be in front of the witness and reference made, so [126] we will know just what question is being referred to, your Honor.

The Court: I think possibly that is proper. The deposition ought to be shown to the witness. Now you are talking about the time when the deposition was taken?

Mr. Heily: Yes.

Q. I am showing you page 8 of the deposition, and quote to you from line 10:

"Q. No intoxicating liquor?

"A. No."

(Testimony of Billy R. Towry.)

The correction is, "No, except for some beer."

The Court: Don't read the corrections, because the corrections are immaterial at this time. You are talking about the time the deposition was taken.

Mr. Heily: Very well, your Honor.

Q. (Reading)

"Q. No intoxicating liquor?

"A. No."

At the time you made that answer, what was your understanding with reference to the meaning of the words "intoxicating liquor"?

Mr. Wynn: Asked and answered, your Honor. Object to it on that ground.

The Court: Will you stipulate the answer is he didn't think—— [127]

Mr. Wynn: He has already answered over my objection.

The Court: Objection overruled.

Mr. Heily: That was concerning July, Mr. Wynn. Now we are referring to the time of the deposition.

The Court: Objection overruled.

The Witness: My belief on intoxicating liquor was hard liquor, not beer.

Q. (By Mr. Heily): Now, I direct your attention to the question on page 15, line 23:

"Q. You didn't drink any beer?

"A. No."

At the time of making that statement, that you

(Testimony of Billy R. Towry.)

had not been drinking any beer, that was false, wasn't it? A. Yes.

Q. Will you tell us the reason, if any, for making that false statement?

A. Well, there hadn't anyone mentioned about drinking in the case before even in the hospital or after we left the hospital or anything. There hadn't been any mention about drinking. That is why I said no. I was cooperating with the insurance company.

Q. You felt, in other words, didn't you, if you answered no, your chance of having judgment taken against you would be lessened, isn't that right?

A. That's right. [128]

Q. And that would amount to avoiding the liability or avoiding having the insurance company pay? A. That's right.

Q. No one had told you anything about——

A. No one had said anything from the insurance company or anyone else about drinking. No one had mentioned it.

Q. Had anyone ever asked you if you had drunk any beer, anyone from the insurance company, prior to that time? A. No, sir.

Q. Had Mr. Medlen ever asked you if you had drunk any beer?

A. I don't recall if he asked me about that or not. There wasn't anything in the small deposition he taken at my home, if that is what that was.

Q. The only thing he asked you is, "Was there any drinking of intoxicating liquors," is that right?

(Testimony of Billy R. Towry.)

A. That's right.

Q. And there was none, was there, of hard liquor, as you understood it? A. No, sir.

Q. How much beer did you actually have that day? A. Approximately six bottles.

Q. Over what period of time?

A. From about 10:00 or 11:00 o'clock that morning until 5:30 or 6:00. [129]

Q. Did you eat during that time?

A. I did.

Q. How many times?

A. One meal at noon and about two or three sandwiches in the afternoon.

Q. Let's get this in chronological order. After the depositions were taken, the next time you were contacted by anyone from the insurance company was in the last part of November or early December, is that correct? A. That's right.

Q. Mr. Medlen came to see you at your home?

A. That's right.

Q. And at that time he stated to you that there had been some mistakes in the deposition?

A. That's right.

Q. And he asked you if you had been drinking beer? A. That's right.

Q. And you told him, didn't you, that you had been drinking beer? A. That's right, I did.

Q. Did you tell him how much beer you had had to drink?

A. Yes. I told him all the stops we made, no

(Testimony of Billy R. Towry.)

cocktail lounge, that they were cafes and they had beer.

Q. But you had beer there? [130]

A. That's right.

Q. And you had a total of not more than five or six bottles of beer? A. That's right.

Q. Small bottles? A. Small bottles, yes.

Q. Then at that time didn't Mr. Medlen say, about the time he was leaving, "Let's keep this quiet," or words to that effect? A. He did.

Q. And didn't he step out of the house and then come back and tap on the door again?

A. He did.

Q. And what did he say then?

A. I opened the door, I was standing in front of the door, and he said, "We have to keep this quiet." He said, "Don't go talking to anyone about it."

Q. You had just had a conversation with your mother, didn't you, just after he left the first time?

A. That's right.

Q. And what were you discussing with your mother?

Mr. Wynn: That is objected to as hearsay.

The Court: I think that the conversation is hearsay, but is the topic of the conversation hearsay?

Mr. Heily: I don't think so. [131]

The Court: Overruled.

Q. (By Mr. Heily): Just tell us the topic of your conversation.

A. Well, I was just talking to my mother about——

(Testimony of Billy R. Towry.)

The Court: You can't tell what you said. The question is what were you talking about?

The Witness: We were talking about keeping it quiet, what did he mean by keeping it quiet.

Q. (By Mr. Heily): Did he overhear you saying that?

A. Well, I don't think he did. He might have. I don't know how close to the door he was, but he just left and came back and knocked.

Q. He went out on the porch and turned around and came back and knocked and said something to the effect that, "Don't say anything about it, keep it quiet"? A. That's right.

Q. During all of your negotiations with Mr. Fraser of the insurance company, Mr. Veatch of the insurance company, and Mr. Medlen of the insurance company, did any of them tell you you had to be sure and tell them all the truth and all the facts?

A. No, except Medlen. He says, when he came to my home in December, about December 1st, that was the only time.

Q. That is the only time he asked you to tell all of the truth and all of the facts? [132]

A. That's right.

Q. In other words, during all of this time, had you been answering any questions they asked you?

A. I did.

Q. You had done everything they had asked you to do? A. Yes.

Q. Signed the papers they presented to you?

(Testimony of Billy R. Towry.)

A. Yes. There were meetings called. I had notices to go to them. I went.

Q. You had to take off from work, did you?

A. I did.

Q. You were working for wages, is that right?

A. That's right.

Q. You took off from work and lost pay?

A. I did.

Q. You did everything they asked you, signed answers to the complaints, and appeared at the offices they asked you to appear at? A. Yes.

Q. Answered every question they asked you truthfully? A. Yes.

Q. This question you were asked concerning your drinking of beer at the time of the deposition, that wasn't [133] asked by the insurance company, was it, or any of their representatives?

A. No, not the insurance company. Mr. Medlen is the only one.

Q. Mr. Medlen is the only one that asked you concerning drinking of beer, but that was in December? A. That's right.

Q. But at the time of the deposition, the insurance company didn't ask you whether you had been drinking beer, did they? A. No.

Q. Only Mr. Hollingsworth and myself, is that right? A. That's right.

Q. Whenever the insurance company asked you any questions, you told them the truth, didn't you?

A. I did.

Q. Next in chronological order, you had a meet-

(Testimony of Billy R. Towry.)

ing with Mr. Ellerby, didn't you? A. Yes.

Q. Where did that take place?

A. At the Ventura County Court House. We met at the Automobile Club. We got into his car and drove to the Court House in Ventura County.

Q. How was that meeting arranged?

A. By mail. He had written me a letter. [134]

Q. And asked you to appear at the Auto Club?

A. Yes.

Q. On a certain day at a certain time?

A. That's right.

Q. And you appeared there? A. I did.

Q. Were you to work that day?

A. I was supposed to work that day, yes, but I did not work.

Q. You took off from work to appear?

A. Yes.

Q. And lost some wages? A. I did.

Q. When you got to the Auto Club, who was there?

A. I walked in. I knew Mr. Fraser. I walked in to Mr. Fraser and I believe, Mr. Medlen wrote the letter, he had his name on the letter, saying to meet him there, and I walked in, and I knew Mr. Fraser. I walked in and shook hands and talked to him and he introduced me to Mr. Ellerby, so Mr. Ellerby and I went to his car and went to the court house.

Q. You went up to the court house with Mr. Ellerby? A. Yes.

(Testimony of Billy R. Towry.)

Q. Mr. Ellerby is of Cass and Johansing, isn't he? A. Yes.

Q. When you got to the Court House, what did you do? [135]

A. He asked for a court reporter. They were all in court at that time, and the lady upstairs asked if we would want another reporter, a private reporter, I believe it was, and the lady called Miss Kay Dawson.

Q. This meeting took place about February 28, 1950, wasn't it?

A. I don't recall the exact date on that. It was in February some time.

Q. I direct your attention to Defendant's Exhibit A, the deposition. It is called a "Reporting of Deposition of Billy Ray Towry, February 28, 1950, reported by Kay Dawson." Is that the one?

A. Yes.

Q. While Miss Dawson was coming to the office, you and Mr. Ellerby were alone in the room, is that right? A. That's right.

Q. During the time you were alone in the room, what did Mr. Ellerby say to you with reference to the purpose of your visit?

A. I asked Mr. Ellerby—he introduced himself from the insurance company, and I asked him when the action was taking place, and he said he didn't know. He said, "I have some questions to ask you and," he said, "I want you to answer them true or false." He said, "When the court reporter gets

(Testimony of Billy R. Towry.)

here, will you answer the questions I ask you true or [136] false?"

Q. Did he say anything about limiting your answers just to true or false?

A. He did. He said he didn't need any explanation, just answer true or false.

Q. All he wanted was true or false?

A. To the questions he asked me, he said, "You answer true or false and don't explain it."

Q. And "Don't explain it"? A. Right.

Q. When Miss Dawson appeared, you followed his instructions, didn't you?

A. Yes, I did. We sat at the table in the court reporter's office in the Court House, and he didn't explain anything else. He just said he had some questions to ask me and answer true or false. He said, "We might as well look at the magazines. She might take some time to get here." So we looked at the magazines until she got there.

Q. You didn't try to explain your answers, is that correct? A. No.

Q. In other words, you did everything he told you to do? A. I did.

Q. Did he have that deposition or a copy of it with [137] him at the time you were in the court reporter's office?

A. Well, I didn't see it. But he was reading from—it looked like a deposition with a brown cover on it. I didn't read it.

Q. You didn't read it? A. No.

(Testimony of Billy R. Towry.)

Q. Had you ever read the deposition or a copy of it up until that time? A. No, sir.

Q. Had it ever been presented to you to read?

A. No.

Q. Did you know where to get it? A. No.

Q. Mr. Veatch was representing you, so far as you knew, isn't that right? A. That's right.

Q. And he never arranged to have the deposition presented to you for correction or review?

A. No, sir.

Q. No one did?

A. No one gave me the deposition to read over or anything.

Q. You don't know for sure Mr. Ellerby was reading from that deposition at the time he was questioning you, but you think he was, is that right? [138] A. Yes, sir.

Q. He didn't show you what was said in there, did he?

A. No, sir. He just read the questions, and then he read the answer, and he says, "When I read the answer," he said, "You answer true or false."

Q. Now, then, about the 13th of March 1950, you received some word, did you not, that the company had denied liability?

A. Yes, sir. It was around the 7th or 8th when I received the letter.

Q. 7th or 8th. The letter is dated March 13th.

A. I mean the 17th or 18th. It was along thereabouts. The letter was dated March 13th.

Q. You got it around the 17th or 18th?

(Testimony of Billy R. Towry.)

A. I did.

Q. You had received word in between the time the letter was dated and the 17th or 18th, that they were denying liability? A. Yes.

Q. And during that time did you do anything yourself?

A. No, I didn't do anything. Mr. Medlen says to keep it quiet, not consult with everyone or anyone, and I didn't go to see anyone about it. [139]

Q. You are referring to Mr. Medlen's statement to you in December or late November?

A. Yes.

Q. He told you not to consult with anyone, not to talk with anyone? A. That's right.

Q. And so you were following his instructions, is that right? A. That's right.

Q. What did you do with reference to this?

A. Well, I was on a job. My father came out and said he talked to some lawyers, that he heard some way, I don't know, it sounded pretty bad, they were withdrawing from the case. I hadn't got the letter, I hadn't received the letter yet.

So my father talked to two lawyers about this and they told my father to have me come in to talk to them.

So I figured if I talked to the lawyers, they would know something about it and I went in and talked to the lawyers about it, and that is the first time I consulted anyone about this.

Q. That is the first time you had said anything to anyone about the accident after Mr. Medlen told

(Testimony of Billy R. Towry.)

you to keep it quiet? A. That's right. [140]

Q. At that time when you talked to the lawyers —that was Mr. Willard, wasn't it?

A. That's right.

Q. The gentleman that testified here yesterday?

A. It was Mr. Willard.

Q. At that time he presented or showed to you the deposition or a copy of it, is that right?

A. Yes.

Q. You had not brought the deposition with you, had you?

A. No, sir. I didn't have the deposition.

Q. He got it some way or other, is that right?

A. He had it in his office.

Q. He had it in his office and you read it over at that time? A. Yes, I did.

Q. And did you make your corrections at that time? A. I did.

Q. The first time you read it over?

A. Yes.

Q. Then you signed it before Mr. Fourt?

A. I did.

Q. With reference to this policy of insurance——

Mr. Heily: We don't have that in evidence, your Honor. [141]

The Court: We have a copy of it in the pleadings.

Mr. Wynn: I attached a copy to my answer and there is a copy attached to the Mack complaint.

Mr. Heily: I would like to be sure it is in evi-

(Testimony of Billy R. Towry.)

dence. Will you stipulate the copy attached to the pleadings may be introduced in evidence?

Mr. Wynn: Certainly.

Mr. Heily: For all purposes of the trial of the action. As I understand it, it may be stipulated that the policy which is attached to the answer in the case may be introduced in evidence as the plaintiff's next in order for all purposes of the case.

The Court: It may be received and marked.

The Clerk: Winget exhibit No. 4.

(The document referred to was received in evidence and marked Plaintiff Winget's Exhibit No. 4)

Q. (By Mr. Heily): Mr. Towry, you were charged a premium for that policy of insurance?

A. I was.

Q. Did you pay that premium? A. I did.

Q. Did you ever receive any refund for the payment of that premium?

A. Not that premium, no. [142]

Q. You never received the payment for the unused portion of the premium? A. No, sir.

Q. So the policy remained in full force and effect during all the period that the premium was meant to have applied? A. Yes.

Mr. Wynn: That calls for an opinion of the witness.

The Court: I think it is his opinion as to whether or not it remained in full force and effect. That may go out.

(Testimony of Billy R. Towry.)

Q. (By Mr. Heily): You said you did receive a refund on something else. What was that?

Mr. Wynn: That is immaterial.

The Court: He testified he didn't get a refund on this policy. What difference does that make?

Mr. Heily: I wanted to be sure it was clear.

Q. You did not get a refund on this policy?

A. No, sir.

The Court: May I ask a question?

Mr. Heily: Certainly.

The Court: After you received notice from the insurance company that they denied liability, did they send you a refund at that time?

The Witness: No, sir.

The Court: Or any time thereafter? [143]

The Witness: No, sir.

Q. (By Mr. Heily): At the time of the trial, did Mr. Thompson request you to testify?

Mr. Wynn: There I don't see the materiality, your Honor. This was an occurrence which after the date upon which the insurance company notified.

The Court: Read the question, please.

(Question read.)

The Court: What difference does it make whether he did or didn't?

Mr. Heily: It merely shows cooperation, your Honor. He cooperated throughout.

The Court: The only allegation that the defendants have made in this case that there wasn't any cooperation was the question of drinking. The in-

(Testimony of Billy R. Towry.)

surance company doesn't contend, never raised the issue that this witness has failed to cooperate in any way except for that one reason. Otherwise, as far as I know, there is no issue here. Objection sustained.

Mr. Heily: Very well, your Honor. I am glad to get that understanding across, too. I believe that's all, Mr. Towry.

Mr. Wynn: May I point out to the jury at this time that the policy of insurance, copy of which has been admitted in evidence pursuant to stipulation, by its terms expired on [144] February 10, 1949.

The Court: Well, it expired after the date of the accident.

Mr. Wynn: That's right.

Redirect Examination

By Mr. Wynn:

Q. Mr. Towry, will you look at the copy of your deposition, which I hand you in the witness box, and refer to page 9, the top of the page. At the time you gave your deposition, was the following question asked you and did you give the answer which I will now read:

"Q. You didn't take a drink all day long?

"A. No."

Was that question asked and did you make that answer? A. That was the question asked.

Q. And that was the answer you made?

(Testimony of Billy R. Towry.)

A. Yes.

Q. And was that answer true or false?

A. That was false. No hard liquor.

The Court: Just a minute. You mean was it true or false at the time it was given?

Mr. Wynn: Yes, your Honor. I am speaking of the time he gave the deposition.

Q. Then I direct your attention on the same page to [145] lines 6 and 7 reading:

"Q. Had you had any beer that day?

"A. No."

Was that question asked and was that answer given by you? A. Yes.

Q. And was that answer true or false?

A. False.

Q. And when you were asked whether you had any beer that day and answered falsely, you did not confuse beer with any other kind of intoxicating liquor, did you? A. No.

Q. Now I direct your attention to page 15 of the deposition, reading from line 21:

"Q. Did you do any drinking there?

"A. No."

Then the following question:

"Q. You didn't drink any beer?

"A. No."

Were those questions asked you and did you give those answers?

A. Yes. I gave "No" as the answer on there.

(Testimony of Billy R. Towry.)

Q. And was that true or false?

A. That was at the home? The answer to that is "No, not at the home." [146]

Q. Directing your attention to page 26, reading from line 6:

"Q. Did you at any time that day go into the U. & I. Cafe?

"A. No."

Was that question asked you and did you give that answer at the time you gave the deposition?

Mr. Heily: I will object to that question as not within the issues, just in line with what you stated before. Drinking is the only thing that is concerned here. Going into the cafe and by any statements about going into the cafe are not claimed by them as lack of cooperation.

Mr. Wynn: Of course, it appears in the questions and answers specifically——

The Court: Overruled. Do you remember the question?

The Witness: Yes. I did go in the U. & I. Cafe. I answered "No" here, but I believe I was in the U. & I. Cafe.

Q. (By Mr. Wynn): So that the answer given was false? A. Yes.

Q. Then the following question:

"Q. Did you at any time that day have a drink of beer?

"A. No."

(Testimony of Billy R. Towry.)

Was that question asked you and did you so answer? [147] A. I answered "No."

Q. Was that true or false? A. False.

Q. Then the next question:

"Q. Did you at any time that day go to Ziegler's Cafe?

"A. No."

Was that question asked you and that answer given?

A. It was given, "No," and it is false.

Q. That was false? A. Yes, false.

Q. Then the next question, "Did you have a glass of beer in Ziegler's Cafe that day?

"A. No."

Was that question asked you and that answer given? A. I believe that one is "No."

Q. Was that false or true?

A. That is false.

Q. At the time you gave your deposition, you felt that beer was to be distinguished from hard liquor, as you phrase it? A. That's right.

Q. But you understood you were being asked specifically whether you had any beer to drink that day? A. I didn't get that. [148]

Mr. Wynn: May the question be read?

(Question read.)

The Witness: I did.

Q. (By Mr. Wynn): At the time you gave your deposition and before any questions were put to

(Testimony of Billy R. Towry.)

you, did you take an oath to tell the truth, the whole truth, and nothing but the truth?

A. I believe so. I am not sure about that, though.

Q. You recall making the statements you have described on February 28, 1950, under questions of Mr. Ellerby, do you not? A. Yes, I do.

Q. At the time you were asked those questions, you were sworn by Kay Dawson to tell the truth, the whole truth, and nothing but the truth?

A. Yes.

The Court: Before you go into the questions and answers, I notice it is 12:00 o'clock and I think it is time to take a recess.

Ladies and gentlemen of the jury, we are about to take another recess.

Again, it is my duty to admonish you you are not to discuss this case with anyone, you are not to allow anyone to discuss it with you, you are not to formulate or express any opinion as to the rights of the parties until this case has been finally submitted to you. [149]

With that admonition, we will now recess until 2:00 o'clock this afternoon.

(Thereupon, an adjournment was taken until 2:00 o'clock, p.m.)

March 28, 1951; 2:00 P.M.

(The following proceedings were had outside the hearing and presence of the jury:)

Mr. Heily: If the court please, the policy of insurance being now in evidence, I now move to amend the complaint to pray for interest on the full $32,000 since the date of the judgment. I think in the memorandum filed by me before trial, you gained the impression I did make such a motion.

The Court: Yes. I have read your cases with regard to the interest. I assume the insurance company will object to the amendment.

Mr. Wynn: Yes, your Honor.

The Court: I will overrule the objection and allow the amendment to be made to include the question of interest. That doesn't mean I am allowing interest. I am just allowing the issue to be presented. I don't know what the ruling is going to be, but I want you to have the opportunity to argue you are entitled to interest. I have instructed you as to the amount of recovery.

Mr. Heily: The evidence is in on that point. It is just a matter of argument.

The Court: Call down the jury. Tomorrow morning, I am going to have to go to a funeral. How much longer do you think this case is going to take? [151]

Mr. Heily: I doubt if I will have more than 15 minutes in rebuttal evidence.

Mr. Wynn: I expect to rest upon completing the examination of the present witness with one excep-

tion, your Honor. I have a witness who is a practicing attorney who is in trial, and should he arrive before or after the matter has been submitted, I might ask to reopen.

The Court: How long are you going to want to argue?

Mr. Wynn: I told counsel it was depending on his argument. Not over 15 or 20 minutes.

The Court: I will want to discuss instructions with you. I am wondering if when we finish tonight I can't excuse the jury until 2:00 o'clock in the afternoon and discuss instructions with you at 11:00 o'clock in the morning.

Mr. Wynn: Yes, sir.

(The following proceedings were had in the hearing and presence of the jury:)

The Court: Is it stipulated the jury is present and in the box?

Mr. Wynn: So stipulated.

Mr. Heily: So stipulated.

The Court: Will you come back to the stand. please. [152]

BILLY RAY TOWRY

the witness on the stand at the time of recess, resumed the stand and testified further as follows:

Redirect Examination
(Continued)

By Mr. Wynn:

Q. Mr. Towry, how long were you in the Lying-

(Testimony of Billy R. Towry.)

In Hospital following the accident of January 1949? A. Eight days.

Q. During the time you were in the hospital, were you interrogated by any members of the California Highway Patrol?

A. The California Highway Patrol came in——

The Court: Just answer yes or no.

The Witness: Yes.

Q. (By Mr. Wynn): How long after the occurrence of the accident was it you were interrogated by those men?

A. About sometime just shortly after the wreck that night.

Q. So that you did give a statement of what occurred to the California Highway Patrol within a matter of two or three days after the accident?

A. Yes.

Q. And you had given such statement to the Highway Patrol men prior to the date of January 28, 1949, on which the report of accident signed by you and marked Defendant's [153] Exhibit D for identification was signed?

A. Yes, I believe so.

Q. Now, I will ask you to read on the reverse side of Defendant's Exhibit D for identification——

Mr. Heily: I am going to object to any further questions on this line as improper cross-examination.

The Court: Counsel has the right to ask the question. You may object to it being answered.

Mr. Heily: I am sorry.

Q. (By Mr. Wynn): ——the typewritten infor-

(Testimony of Billy R. Towry.)

mation on the reverse side of Defendant's Exhibit D for identification as to the version of the accident given thereon, and ask you whether that is the version you gave to the California Highway Patrol officers.

Mr. Heily: I object as improper examination.

The Court: Overruled. You can answer yes or no.

The Witness: I don't recall what I told the Highway Patrol that night. I just remember seeing them there. I can't say it was even two hours after the accident. I don't know exactly when it was.

Q. You have read, however, from the exhibit now before you the statement as to the occurrence of the accident, have you? A. Yes.

Q. Do you agree with that version of the accident as [154] stated on the exhibit before you?

Mr. Heily: Object to that as calling for a conclusion of the witness.

The Court: Sustained.

Mr. Wynn: May I be heard, your Honor? Now if I may be heard just a moment, we are confronted with an action in which the witness called by us is a party interested in the outcome of the action and definitely interested, and he is a party to the contract. Now, I have called him as my witness by virtue of the fact that under the rulings of the court, the burden is upon me to prove our affirmative defense. That defense is based on what this witness will admit upon examination on the witness

(Testimony of Billy R. Towry.)

stand. I think that he is a party to the action in effect. He is a party for whose interest the action is maintained, in the first place, and, secondly, I believe I am entitled upon it appearing in evidence that the person is an adverse witness in effect, to cross-examine him, although called by me.

The Court: Let me ask you a question. Supposing that this witness had made a statement on which you could rely for the avoidance of your policy to a stranger, not to the insurance company, not to representatives of the insurance company, but to a stranger. Do you think that the insurance company can rely for the avoidance of a policy on a misstatement made to someone else other than the insurance company? [155]

Mr. Wynn: Definitely I do.

The Court: Have you any authorities?

Mr. Wynn: If he made a misstatement to a person entitled to examine him upon it and that misstatement of fact is incorporated——

The Court: Does a highway patrolman have the right, as a matter of law, to examine the—he has the right to ask the question. If the witness doesn't answer, he has no way of forcing the witness to answer. It is purely voluntary. Does he have the right as a matter of law? The Highway Department wasn't representing the insurance company. If they were representing anybody, they were representing the people of the State of California, including this witness.

Mr. Wynn: This is just whether your Honor

(Testimony of Billy R. Towry.)

should declare certain things immaterial after the accident.

The Court: If you have got an authority that says you can rely upon a misstatement made to a stranger, someone that is not connected with the insurance company, I will read it.

Mr. Wynn: I submit the fact that the document containing information passed to the third person was transmitted to the insurance company.

The Court: I am going to have to hold that the representation must be made to the insurance company, and the insurance company cannot rely upon a representation made to a stranger. [156]

Mr. Wynn: Not wishing, of course, to inquire against the court's ruling, do I understand I may not inquire of this witness as to whether or not he did state he had had nothing intoxicating to drink upon being examined by anyone shortly after the accident?

The Court: Unless you can show this was a misrepresentation made to the insurance company or its legal representative.

Mr. Wynn: I offer to prove by the witness on the stand that——

Mr. Heily: If there is going to be an offer of proof, I suggest it be made out of the hearing of the jury.

The Court: Yes, I think your offer should be made outside the presence of the jury. You can wait until the 3:00 o'clock recess. Then I will allow you to make your offer of proof.

(Testimony of Billy R. Towry.)

Mr. Wynn: Very well. No further questions.

Recross-Examination

By Mr. Heily:

Q. You were examined, Mr. Towry, regarding questions on page 9, line 6, of the deposition. I believe you were asked if you had testified—

"Q. Had you had any beer that day?

"A. No." [157]

You said that was false, is that not true?

A. That's right.

Q. Then you later corrected that to read, "Yes," is that not true? A. Yes.

Q. And you not only corrected it to read, "Yes," but you told Mr. Ellerby that it was not true on February 28, didn't you? A. That's right.

Q. And all of these corrections in this deposition were made by you at the time the deposition was first presented to you, weren't they?

A. That's right.

Mr. Wynn: Just a moment. That assumes a fact not in evidence.

The Court: Just a moment. The answer may go out for the purpose of the objection. I might instruct the witness if an objection is made he is not to answer until after the court has ruled upon the objection.

Now, will you read the question, please?

(Question read.)

(Testimony of Billy R. Towry.)

Mr. Wynn: That assumes a fact not in evidence, at the time it was first presented.

The Court: I think you are right, because there is no evidence yet as to when this deposition was presented to the [158] witness. You have the evidence in that the deposition was taken at a certain time. You have the evidence he went to a second place to make corrections. I don't know what happened. Neither does the jury. Was the deposition sent to this witness by mail? Did he pick it up at the office of the court reporter? How did he get hold of it? Did he see it before he corrected it? The objection is good. I sustain the objection.

Mr. Heily: I was under the impression this morning he testified as to when it was first presented to him.

The Court: The only evidence about the deposition is that he took the deposition or gave it, and then some months later he went in and corrected it but as far as I know, there is no evidence as to what happened between those two dates.

Q. (By Mr. Heily): Mr. Towry, the deposition was never presented to you, was it, until you went to the office of Mr. Willard during this period of March 13th to March 20, 1950; is that correct?

Mr. Wynn: I object to that question as leading and suggestive.

The Court: Sustained.

Mr. Heily: This is cross-examination.

The Court: You can ask him when he first saw the deposition after it was transcribed.

(Testimony of Billy R. Towry.)

Mr. Heily: All right. [159]

Q. When did you first see the deposition after it was transcribed?

The Court: Do you know the meaning of the word "transcribed"?

The Witness: Yes.

The Court: When it was written up.

The Witness: Yes. Approximately March, between the 13th and 20th.

The Court: What year?

The Witness: 1950.

Q. (By Mr. Heily): That is the first time you ever saw it to recognize it as a deposition, is that right? A. That's right.

Q. That was where?

A. At the office of Hammons and Willard in Ventura, attorneys.

Q. Did Mr. Willard present it to you to read over? A. Yes, he did.

Q. That is when you made the corrections, is that correct? A. Yes, that is correct.

Q. When Mr. Ellerby was examining you on February 28th, he didn't show you the deposition, did he? A. No.

Q. Now, I direct your attention, Mr. Towry, to page 1 [160] of the deposition, lines 15 to 19. Will you read that over, and I will ask you if you recall that statement having been made? That is 15 to 19, page 1. Do you recall that statement?

A. Yes.

Mr. Heily: I will read it for the benefit of the

(Testimony of Billy R. Towry.)

jury. It is a statement in the deposition of Mr. Towry. "Mr. Veatch:"——

Q. Incidentally, he was your attorney, wasn't he? A. Yes, sir.

Mr. Heily: Mr. Veatch states: "I think that we might include in the stipulation that he have an opportunity to read over and make any corrections should he choose to do so, and if he does not sign after a reasonable opportunity has been given it might be used without signature; is that satisfactory?"

Q. What was your understanding of that statement, Mr. Towry?

Mr. Wynn: Object to the question.

The Court: Sustained.

Mr. Heily: I believe that's all.

Redirect Examination

By Mr. Wynn:

Q. Mr. Towry, immediately after reading it and making [161] the changes which you made in the deposition, you appeared before Walter J. Fourt and signed the same, did you? A. Yes, I did.

Q. And Mr. Fourt, now Judge Fourt, at that time asked you if you were changing your testimony in order to make it appear truthful, did he not?

A. Yes.

Q. And you said that that was your desire?

A. Yes.

Mr. Wynn: That's all.

Mr. Heily: That's all.

The Court: You may step down.

(Witness excused.)

Mr. Wynn: Defendant rests, your Honor.

The Court: Subject to the other witness?

Mr. Wynn: A qualification which I will urge upon the court, if necessary, this other witness.

The Court: If you have another witness who comes in, we will allow him to testify.

Mr. Heily: I will call Mr. Mack.

THOMAS MACK

called as a witness on behalf of the plaintiff in rebuttal, having been first duly sworn, was examined and testified as follows: [162]

The Clerk: Will you state your name, please?

The Witness: Thomas Mack.

The Clerk: Is that M-a-c-k?

The Witness: Yes.

Direct Examination

By Mr. Heily:

Q. Where do you live, Mr. Mack?

A. Ventura.

Q. You are the plaintiff in an action against Billie Ray Towry in the Ventura Circuit Court?

A. Yes.

The Court: Will you speak up a little louder, please?

Q. (By Mr. Heily): Calling your attention to about April, 1949, did you have a conversation with Mr. Medlen? A. Yes.

(Testimony of Thomas Mack.)

Q. You are acquainted with Mr. Medlen, who has been here and testified? A. Yes.

Q. And did that concern the accident in question? A. Yes, it did.

Q. What did Mr. Medlen ask you concerning drinking?

A. He asked me if I had been drinking.

Q. What did you tell him?

A. I told him yes. [163]

Q. Did he ask you anything about Mr. Towry?

A. He asked me if he had been drinking.

Q. What did you tell him?

A. Yes, I told him he drank a small quantity of beer.

Q. A small quantity of beer? A. Yes.

Q. Is that all he asked you, concerning drinking?

A. No. He asked me where I was working and how the accident happened, and if I was well taken care of in the hospital, and the approximate amount of my bills, and things like that.

Q. You distinctly remember telling him Mr. Towry had some beer to drink, do you?

A. Yes.

Q. That was in April, 1949?

A. It was in April, 1949.

Mr. Heily: That's all.

Cross-Examination

By Mr. Wynn:

Q. Mr. Mack, you gave your deposition, did you

(Testimony of Thomas Mack.)

not, in the proceeding you brought against Mr. Towry in Ventura Superior Court?

A. Yes, I did.

Q. You were present on the occasion of Mr. Towry [164] giving his deposition in that action, were you not? A. Yes, I was.

Q. You overheard the testimony given by Mr. Towry at that time, didn't you? A. Yes.

Q. And it was a fact that he denied having consumed any beer on the day of the accident, didn't he? A. Yes.

Q. Did you speak up at that time to correct him? A. No.

Q. Did you subsequently contact anyone on behalf of Mr. Towry's insurance company to tell them that that testimony was false? A. No.

Q. To your own knowledge, it was false at the time it was given, was it? A. Yes.

Mr. Wynn: That's all.

Redirect Examination

By Mr. Heily:

Q. You say you did not speak up to correct Mr. Towry at the time he gave his testimony. Where were you at the time he gave his testimony?

A. In Mr. Hollingsworth's office. [165]

Q. Were you present in the same room?

A. Sir?

Q. Were you present in the same room?

A. Yes.

(Testimony of Thomas Mack.)

Q. You had your attorneys there to represent you, didn't you? A. Yes.

Q. It was rather a formal proceeding, as far as you were concerned? A. Yes.

Q. Was there any reason why you didn't speak up?

Mr. Wynn: Just a moment. Any reason why he didn't calls for his opinion.

The Court: Will you read the question, please?

(Question read.)

The Court: Sustained.

Q. (By Mr. Heily): Mr. Towry's attorney, Mr. Veatch, was there? A. Yes.

Q. And you had Mr. Henderson and Mr. Hollingsworth representing you, didn't you?

A. That's right.

Mr. Heily: That's all, your Honor. May this witness be excused?

The Court: May he be excused? [166]

Mr. Wynn: Yes, your Honor.

The Court: He may be excused.

(Witness excused.)

Mr. Heily: Call Mrs. Towry.

MRS. RAY TOWRY

called as a witness by and on behalf of the plaintiff in rebuttal, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you be seated, and state your name?

The Witness: Mrs. Ray Towry.

Direct Examination

By Mr. Heily:

Q. Mrs. Towry, where do you live?

A. 120 East Ramona, Ventura.

Q. Are you the mother of Billie Ray Towry?

A. Yes, sir.

Q. I direct your attention to the latter part of November or the early part of December, 1949. Do you recall hearing a conversation between Billie, your son, and Mr. Medlen?

A. Well, he was there, yes.

Q. Did you hear parts of that conversation?

A. Part of it, and part of it I didn't. [167]

Q. Will you relate to us what part you did hear, please?

A. Well, you mean just tell what I heard?

Q. Just tell what you heard.

A. Well, he asked him if he had any beer, and he says now is the time to tell us.

Q. Billy said that, or did Mr. Medlen say it?

A. Mr. Medlen said it.

Q. Mr. Medlen said, "Now is the time to tell us if you had any beer"? A. Yes.

(Testimony of Mrs. Ray Towry.)

Q. What did Billy say?

A. He said, "Well, yes," he says, "I had beer," and he says, "Is that all you had to drink?" And he said "Yes."

Q. Did you hear anything else said then?

A. Well, he said, "Well," he says, "this should be kept quiet."

Q. Mr. Medlen said, "This should be kept quiet"? A. Yes.

Q. Then what did Mr. Medlen do?

A. Well, they talked on, you know, but I didn't pay much attention to what they said. Of course, I noticed that, because I wondered why it should be kept quiet. Shortly, then, he left, went out the door. Naturally, we started talking, you [168] know.

Q. What did you talk about?

A. Well, we said, you know, why he wants it kept quiet.

Mr. Wynn: Just a moment, your Honor. I have no objection to the subject of the conversation, but as to what she said is hearsay.

The Court: Sustained. The last answer may go out.

Q. (By Mr. Heily): Just tell us what you talked about, not what was said.

A. Well, just about what—you know, about him saying it should be kept quiet, that's all.

Q. And then Mr. Medlen came back?

A. Yes. He went out the door and we thought he was gone, that is when we started talking, and

(Testimony of Mrs. Ray Towry.)
he turned around and tapped on the door, and we opened the door and it was him.

Q. What did he say then?

A. He said, "Let's be sure, now, we keep this to ourselves and keep it quiet." I don't know which it was, something like that.

Mr. Heily: You may cross-examine.

Cross-Examination

By Mr. Wynn:

Q. Did Mr. Medlen in connection with advising the matter should be kept quiet, observe that there could be any [169] criminal prosecution against your son? A. Well, I don't know.

Q. You don't know?

A. I don't know what he meant, you know. That is why we started talking about it. We wondered what he meant.

Q. You did not ask Mr. Medlen why he felt it should be kept quiet?

A. No. I never said a word to him.

Q. And no question of criminal prosecution of your son was suggested at that time? A. No.

Mr. Wynn: That's all.

Mr. Heily: That's all. Thank you.

The Court: You may step down.

(Witness excused.)

Mr. Heily: If the court please, the plaintiff rests, and I would like to have these witnesses excused now.

Mr. Wynn: The defendant rests, your Honor.

The Court: You don't think you want to use this other witness?

Mr. Wynn: I am embarrassed, as the court can understand. I would like to use him.

Mr. Heily: May I interrupt, your Honor? I have rested, really, for the purpose of all my witnesses. I neglected to ask to introduce this documentary evidence and I will not [170] rest until I present that.

The Court: Well, better make your offer of introduction, then.

Mr. Heily: At this time, your Honor, I will offer in evidence Plaintiff's Exhibit 1 for identification.

Mr. Wynn: I think that was marked for identification. My objection was to the introduction in evidence.

The Court: It was marked for identification. He is now offering it in evidence.

Mr. Wynn: I misunderstood counsel.

The Court: It is being offered in evidence.

Mr. Wynn: I object to its introduction on the ground that it is immaterial under the decisions of the court in the Valledao vs. Firemen Insurance Fund, 13 Cal. 2d, 322, and Home Insurance vs. Standard Accident Insurance.

The Court: How is that going to establish the fact that the insured either cooperated or didn't cooperate?

Mr. Heily: It does establish it to this extent.

It proves that the falsification was not material in the judgment of the court in Ventura County.

The Court: Now, there was some testimony allowed bordering upon the question of willful misconduct. I don't want this jury to get the idea they are trying that part of the case. That case has been tried. The jury made its decision. It is over with. That question has been resolved. This [171] question, also, has been resolved. What difference does it make?

Mr. Heily: Again, I say the materiality of whether he was drinking or not depends upon what occurred at that trial.

The Court: No. It depends on what he was doing on the day of the accident, not what he did at the trial, but it is what happened the day of the accident that is material.

Mr. Heily: I mean the materiality from the standpoint of whether he has violated the cooperation clause.

The Court: I will sustain the objection. It hasn't a thing in the world to do with this case.

Mr. Heily: I offer in evidence Plaintiff's Exhibit No. 2 for identification.

Mr. Wynn: To which we interpose the same objection, on the same ground as stated to the plaintiff's ofler of Exhibit 1 for identification.

The Court: Same ruling.

Mr. Heily: I will now offer Plaintiff's Exhibit No. 3 for identification in evidence.

The Court: You know, Mr. Heily, I don't want this jury to try that other case in any way what-

soever. The issues in that case were presented to an entirely different jury. They came to a verdict. This jury is bound by that verdict. They may not agree. If they had been the jury in that case, they might not have given you a judgment. I don't know. I don't [172] want them to try the other case. I am going to sustain the objection. I don't think this has a thing in the world to do with the case at bar.

I might say if there was any evidence that the insured did not cooperate at the time of trial, it might be a different situation, but the only non-cooperation here is the question of drinking, not at the trial, not what happened when the complaint was filed.

Mr. Heily: Your Honor, I now offer in evidence the motion to dismiss, exemplified copy of the minutes of the Superior Court of Ventura County showing the motion to dismiss, Counts 2 and 3, pertaining to intoxication at the trial at that time, which motion was denied on the objection of counsel for the defendant.

Mr. Wynn: To the introduction of which we object on the same grounds given as to Plaintiff's Exhibits 1, 2 and 3 for identification.

The Court: I don't think this jury is interested at all in the complaint that was filed, the various counts filed, the motions that were made to the court, the rulings of the court, as far as that case is concerned. This jury is only interested in one matter. The jury found in favor of the plaintiff for a certain amount of money. The reason for

the jury's finding, the requests of the court, the motions, the court's rulings, the reasons for denying motions, are absolutely [173] immaterial. Your offer is rejected. The objection is sustained.

The Clerk: Should that be marked for identification, your Honor?

The Court: It may be marked.

The Clerk: Winget's Exhibit 5 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 5 for identification.)

Mr. Heily: Now the plaintiff rests, your Honor.

The Court: You have an offer you want to make?

Mr. Wynn: Yes, I did, your Honor.

The Court: Supposing we excuse the jury until 3:00 o'clock, and in the meantime if your party comes in, we can have the testimony. Otherwise, not.

Mr. Wynn: I have just called my office again through my assistant and he is not available.

The Court: I have some matters I want to discuss with counsel, also, as well as the offer of proof.

Mr. Heily: If the court please, if we are going to hear the other witness, undoubtedly it will be pertaining to statements made, so I will want the witnesses to remain. I notice they are still here.

The Court: All the witnesses will remain subject to call until they are excused after the 3:00 o'clock recess.

Mr. Wynn: Thank you, your Honor. [174]

The Court: Ladies and gentlemen of the jury, we are about to take another recess. Again it is my duty to admonish you you are not to discuss this case with anyone, you are not to allow anyone to discuss it with you, you are not to formulate or express any opinion as to the rights of these parties. This case will not be submitted to you until after the argument of counsel and the instructions of the court, and until the court instructs you, you don't know what the law is applicable in this case. Consequently, it is very important you keep an open mind and not form any conclusions whatsoever. I know it is very easy now, after you have heard all the testimony, to come to some conclusion, either that the plaintiff should recover or that he should not recover; that the defendant is in the right or he is not in the right, but you should keep an open mind and formulate no opinions at all as to the rights of the parties.

We will now recess until 3:00 o'clock.

(Recess.)

(The following proceedings were had outside the hearing and presence of the jury:)

The Court: You can make your offer.

Mr. Wynn: I will recall Mr. Towry to the [175] stand.

BILLY RAY TOWRY

recalled as a witness, having been previously duly sworn, was examined and testified further as follows:

Mr. Wynn: I now offer to prove by the witness Billy Ray Towry that subsequent to the date of the occurrence of the accident, on or about January 26, 1949, in Ventura County and prior to the date of January 28, 1949, the witness gave a report to representatives of the California Highway Patrol, in which the witness reported that he had not been drinking.

I think that is the limit of what I could attempt to prove by this witness. The tie-in would be, of course, that the information came to the defendant, but I offer to prove by the witness those facts.

Mr. Heily: In respect to that, first of all, the witness has already testified he doesn't remember what he told the Highway Patrol.

Secondly, it is immaterial, incompetent, irrelevant, no proper foundation, not the best evidence. It is an attempt to impeach his own witness.

The Court: Well, now, your insurance policy provides only, if I can recall the subdivision correctly, that the insured shall cooperate with the company. It doesn't say he shall cooperate with anybody else. It doesn't say he should cooperate with the Motor Vehicle Department. It doesn't say he should cooperate with the police officers. It [176] doesn't say, even, that he shall cooperate with attorneys. It says cooperate with the company. I think

(Testimony of Billy Ray Towry.)

you are bound by that provision. I don't think you can come in and say we can avoid the policy because the insured did not cooperate with a stranger to the action. So I am going to deny your offer of proof.

Mr. Wynn: Very well.

The Court: May this witness step down?

Mr. Wynn: Yes.

The Court: You may step down.

(Witness excused.)

The Court: Now, I have another problem I doubt very much if counsel can give me very much light on. To me it is a very interesting problem. It has to do with the deposition. The deposition shows that these questions were asked by Mr. Hollingsworth. They weren't asked by the insurance company at all. It is true that the insurance company was represented at the deposition.

Can you give me any authorities as to whether or not a misstatement to an attorney in a deposition when attorneys for the insurance company are present is a misrepresentation to the insurance company?

Mr. Wynn: You pose a question I cannot turn to the desk behind me and find a volume and turn to the page so holding, but I will say in reliance on the cases already [177] cited to the court that the truth is what can be and must be expected from an insured. The telling of a falsehood is a falsehood other than one which might be explained by

forgetfulness. The telling of a falsehood goes to the meat of the case, just as in the Valledao case where, as you recall, the insured said, "No, I was not driving the automobile." In fact, he was driving the automobile. The insurance company, upon learning that he had made that false statement, said, "We are through." A judgment was obtained against him and suit brought on the policy.

There the jury enthusiastically found that the plaintiff was entitled to recover, but on motion for judgment notwithstanding the verdict, the court said, "That is a misrepresentation of a fact made to the insurance company or made to people acting on their behalf."

Here is a deposition, a sworn statement of the person insured by my company. He is sworn to tell the truth as though he were in a court of law, nothing but the truth, before a notary public, and he makes a false statement, admittedly false, in his own language. Untrue. He knew it was untrue at the time.

Now you raise the question, the court has raised the question as to the deposition. Can it be said that a man who swears to tell the truth in a deposition, which we know is a proceeding in the action under the law of the state just as [178] much a part of that action as though it were in open court, and he makes that false statement. If I can't rely on that false statement, then I could not say as to any assured sittting on the witness stand sworn before your Honor, who told a lie, that that was any defense.

The Court: That is true, but evidently this witness was called by the plaintiff. He was not called by the insurance company. He was called not by the defendants, but he was called by the plaintiff. It says, "Billy Ray Towry, a witness produced on behalf of the plaintiffs." The insurance company knew of the deposition. They were there as spectators.

Mr. Wynn: And we also know as defendants who are representing the defendant that that fellow is bound by the testimony he gives. Under Section 2055 of the Code of Civil Procedure of the State of California, he is subject to cross-examination and that, your Honor, I say, to me the whole answer is that the deposition proceeding is a proceeding in the Superior Court of the State of California in and for the County of Ventura just as though the man was in court.

Now, when we put a witness on the stand, can I go up and question him and say, "Now, it is true you are a plaintiff in this action. I want to know these things, but it isn't binding on you as plaintiff." Of course it is. Here he was sworn to tell the truth and he lied.

I think in the Valledao case there was a [179] deposition and certainly, if not in that, in the Home Accident vs. Standard Accident, 167 F. 2d, a deposition was given in which these false statements were made. Of course, we have false statements here, referring to the court's ruling as to the assured's report of the accident, we have the written signed statement of July 11, 1949, of the facts. In

the Valledao case and in the Home Accident case, the same thing. In some of those cases, it wasn't blessed by an oath. He simply came into the office of the attorney and said, "This is what occurred." It turned out to be untrue or to be a conflicting statement.

In the Valledao case a deposition was given in which the assured said, "No, I didn't drive the car at all." The deposition obviously was taken by the opposing party. I know of no case in which a defendant can take his own deposition, unless he establishes that his health will not permit his being called into court.

So I say, as far as the deposition is concerned and that statement, it is made to and the insurance company has the right to rely on it as a sworn statement of fact.

The Court: I never heard of the issue being raised before, to be frank with you, but I don't know whether there are any cases on this. It seems to me it is a very interesting point of law.

Mr. Wynn: I am making a note here. [180]

Mr. Heily: I am directing the court's attention to the fact that in Defendant's Exhibit F the company takes the position that by virtue of false testimony, he failed to cooperate.

Mr. Wynn: That was not admitted in evidence.

Mr. Heily: Yes, it is. That is the portion admitted in evidence. That is the only reason they gave for denying liability, false testimony.

Now there is a case, not directly in point, but the language certainly is appropriate, cited in my

memorandum, 26 Southwestern, a Missouri case. The court held that the assureds willingly came to the office of the insured when he requested. He had their deposition taken, and if they were not cross-examined by the insurance company's attorney, it was through no fault of their own. They gave signed statements setting forth their version of how the accident came about. It wasn't held that they wilfully misinformed the attorney of a single fact, nor was there a pretense of any collusion between them and the plaintiff. It is the same situation here.

I think a motion for a directed verdict is in order.

The Court: I think your motion would be denied if you want to make it.

Mr. Wynn: In the interest of thoroughness, I wish again to read from Defendant's Exhibit F, in which counsel reads that the company took the position that it denied responsibility because of false statements in the deposition. [181] May I point out to the court that document likewise charges the assured with false statements made at the time he reported the accident and on July 11, 1949——

The Court: I know it does. What counsel read is only half the story. It is a very interesting matter and maybe over the night you can dig up a case.

Mr. Heily: In that connection, I will make an offer of proof by Mr. Ellerby——

The Court: I don't know what an offer of proof will avail you.

Mr. Heily: Perhaps I will make a motion to reopen in that connection. If Mr. Ellerby is coming down, we can get it directly. I will offer to prove

in connection with a motion to reopen, when Mr. Ellerby was questioned on supplementary proceedings after judgment in this case, he was asked a question, "You say the only reason for denying liability is non-cooperation and the only non-cooperation is his lying about drinking in the depotion?"

"A. That is correct."

The Court: Well, I think it is a question of fact. If you had made a motion, it is denied. I think we will take the recess now. We will recess until 10 minutes after 3:00.

Mr. Wynn: May I interrupt? I take it now I will not be able to produce Mr. Ellerby. My son called and he is still on trial in Burbank, so we will rest. I thought I [182] would mention that if your Honor cares to release the jury and take up matters in chambers.

The Court: No. We will wait until we call the jury out.

Mr. Heily: Shall we dismiss the witnesses?

The Court: Yes, if you wish to.

(Recess.)

The Court: Is it stipulated the jury is present and in the box?

Mr. Wynn: So stipulated.

Mr. Heily: So stipulated.

The Court: Ladies and gentlemen of the jury, we are about to take another recess. It will be necessary to discuss proposed instructions with counsel, and consequently you will not be called

back until tomorrow afternoon. You will be excused now until tomorrow afternoon at 1:30. Suppose we say 1:30?

Mr. Wynn: All right.

The Court: In the meantime, you are not to talk with anyone about this case, you are not to allow anyone to talk to you about it, you are not to formulate or express any opinion as to whether the plaintiff is entitled to judgment or the plaintiff is not entitled to judgment, whether the equities are with the defendant or they are not with the defendant. In other words, you are to keep an open mind until this [183] case has been finally submitted to you. This case will not be submitted to you until after the argument of counsel and the instructions of the court sometime tomorrow afternoon. With that admonition, you now may be excused until 1:30 tomorrow afternoon.

I will see you gentlemen in chambers at 11:00 o'clock in the morning.

(Whereupon, at 4:15 o'clock p.m., an adjournment was taken until 11:00 o'clock a.m. Thursday, March 29, 1951.) [184]

March 29, 1951—11:00 A.M.

(The following proceedings were had outside the hearing and presence of the jury:)

The Court: Have you got your instructions?

Mr. Heily: Yes, sir.

The Court: I will take your instructions and I will tell you the ones I propose to give, and then

we can discuss them. I propose to give Defendant's Exhibit No. 2.

Mr. Wynn: Just a moment. I have three sets here.

The Court: Well, forget Mack. Get Defendant's No. 2. There is nothing wrong with that.

I propose to give Plaintiff's No. 2 and Plaintiff's No. 3; Plaintiff's No. 4; Defendant's No. 4; Defendant's No. 6; Defendant's No. 20; Defendant's No. 19; Defendant's No. 18; Defendant's No. 17; Defendant's No. 8; Defendant's No. 9; Defendant's No. 7; Plaintiff's 8; Plaintiff's No. 9; Plaintiff's No. 10; Plaintiff's No. 15; Defendant's No. 11; Defendant's No. 12; Defendant's No. 14; Defendant's No. 15; Defendant's No. 16; Plaintiff's No. 16.

Here is an instruction that hasn't been numbered, I think, which sets forth the Subsection 8 in toto. There is a copy for each of you.

For the purpose of clarity, let's make that Instruction 8 so that we can discuss them by [186] number.

This one is Instruction B. It is one of the Mack instructions, except it has been changed in a little particular, not very much, but a little. If you have any objection, we might discuss these as we go along.

Mr. Wynn: Could your Honor indicate which instruction in Mack B is?

The Court: I cannot tell you.

Mr. Heily: I don't see any objection to it.

The Court: I had it marked. I expect I can tell you which it is. I think they are still marked. The

first instruction was Mack 4 and the instruction B is Mack 5.

Mr. Wynn: I have no objection to Mack 4. Mack 5 wasn't requested by anyone. That is why I don't have it here before me.

The Court: In the Federal Court, the court gives the instructions. The fact of the matter is Judge Mathes gives his own instructions.

Mr. Wynn: And he makes his own findings.

The Court: He writes his own instructions. Well, now, Instruction C, there is a copy for each of you, and that is Mack 6. That is an instruction about how a deposition is taken.

Mr. Wynn: I have no objection to it.

Mr. Heily: I wonder if you wouldn't add in there Thomas B. Mack and Vivian Delozier had the deposition taken? [187]

The Court: This deposition was taken in the case of Mack vs. Towry and also in the case of Winget vs. Towry. Maybe that should be changed from Thomas B. Mack to Winget. I think that we will change that. Filed in the State court by Vivian Delozier. We will correct that.

Mr. Heily: And then you strike out Thomas B. Mack?

The Court: Yes. In the action filed in the State court by Vivian Delozier and the deposition of the defendant Billy Ray Towry. Anything wrong?

Mr. Wynn: I suppose we should say, "Now known as Vivian Winget."

The Court: All right. That is C.

Now, D is the section of the code about the taking of depositions. That was Mack 7.

Instruction E is Mack 9.

Mr. Wynn: I have some matters on that.

The Court: Some objections? All right.

Mr. Wynn: This instruction in effect tells the jury that the repeating or the telling of a second story as to occurrences cures any lack of cooperation in previously telling the first story. This is what occurred in the Valledao and Home case. I am reading from my notes on which I am basing my objection. This Instruction E now informs the jury that if the jury believes that after Towry had given his deposition, he told the Standard Accident Insurance Company [188] that the story in his deposition was false, the jury might take that into consideration in determining whether he acted in good faith in his dealings with the company or whether he violated the cooperation clause.

This is in effect my objection. It says to the jury no matter if a person made a statement of a fact, if he subsequently tells the insurance company that that statement was a false one, that he cures the——

The Court: No. It says the jury may take into consideration. It doesn't say it cures it. The jury may take that into consideration in determining whether or not he violated the cooperation clause. I don't tell them to take into consideration or don't tell them it is a cure. I say they may consider it. Isn't that the question of fact here?

Mr. Wynn: My argument and my objection to this instruction is based upon a contention that in

both the Valledao and the Home Insurance Company cases, that is precisely a matter which it is there held is not a question of fact for the jury, but is a question of law for the court. That is the basis for the objection.

Mr. Heily: I disagree with that.

The Court: If that was a question of law——

Mr. Heily: The distinction between this Valledao and Home case and this case lies in this. In those cases the question of cooperation had been determined beforehand. [189] Whether or not they had cooperated had already been determined, and it was determined that they had not cooperated. The only question in those cases was whether a prejudice had to be shown or whether it would be presumed in law on the facts, and those cases dealt almost entirely with the matter of prejudice.

The Court: If it was a question of law whether or not the insured cooperated, we wouldn't need a jury in this case at all.

Mr. Wynn: Quite so. We will get to that.

The Court: There is no question about that. I think E is satisfactory. I see nothing wrong with E.

Now, F is Mack's 10.

Mr. Heily: That would be the same as E, insofar as argument is concerned.

The Court: Same argument?

Mr. Wynn: Somewhat the same. I object in the first place to this instruction being given in the manner it is, including the words, because of the words "correcting" in line 1 and "correction" in

line 7. I submit it should be changing. He changed his deposition in those two respects.

The Court: Let's look at that just a minute and go back to the code section. "When completed, it must be carefully read to and by the witness and corrected," not changed. It says "corrected." [190]

Mr. Wynn: That in effect is saying to the jury what he subsequently told is the truth, and who knows whether it is right or wrong? He told two stories and he changed his testimony.

The Court: But the statute provides that the deposition shall be corrected. If the statute provides it shall be changed, that is another thing. This follows the word of the statute.

Mr. Heily: Changing and correcting, so far as I can see, are synonymous.

Mr. Wynn: But that is not the principal objection to this.

The Court: All right.

Mr. Wynn: As I read this instruction, it in effect tells the jury that it might take into consideration the fact that the insurance company knew of a change in the story. "The jury shall take that into consideration in deciding whether he originally testified that he had been drinking." That doesn't make sense to me. He didn't so originally testify.

The Court: I am wondering about the instruction myself. There is a case I read which holds that the insurance company did not have to rely upon the statement in order to avoid the policy.

Mr. Wynn: But, you see, as this reads, your Honor read [191] the last four lines, whether or not

the insurance company relied upon the fact that in originally giving his testimony, Towry testified he had been drinking some beer, and that is not the fact. When he originally testified, he did not do that.

The Court: I think this instruction may be objectionable, so I am going to refuse to give Instruction F.

Now, G is Mack 13.

Mr. Wynn: My only objection to that instruction was that the instruction is wholly immaterial, there being no question but that the insurance company did learn of the conflicting stories through the only people a corporation can, its agents or attorneys.

The Court: There is no question of agency. They are not denying it on that ground. They haven't even said, "We are not responsible because we didn't know." I see nothing wrong with the instruction, but it is inserting an issue that is not before the jury.

Mr. Wynn: That's right.

The Court: G will be refused.

H is No. 15.

Mr. Wynn: Shall I speak?

The Court: Yes.

Mr. Wynn: My objection to Mack 15 in the proposed Instruction No. H is that it improperly tells the jury that the [192] jury may consider the subsequent correction of a false statement in showing whether he made a false statement. As this reads, about the middle of line 11 or 12, "I instruct you you may take the fact of such disclosure, if

it be a fact, by Towry, of drinking of the beer and in subsequently correcting his deposition, to determine whether or not he made any willful, false or deliberate misstatements."

Now, is it proper to say to a jury, "You may determine that because the man subsequently said what he originally said is false, you can determine that he did not willfully make the original misstatement"? That is the way I read this, and in effect it says to the jury, "You can decide if he corrected his testimony or corrected his statements, you can consider that correction in determining whether he originally made a false statement."

Mr. Heily: I think that the issue here is whether he made a material false statement, and in determining whether it is done willfully and deliberately, they must take into consideration the facts surrounding the making of it, and among those facts are the correction of it.

The Court: I would hold with the defendant on this instruction, if it was not for one thing. Was it stipulated that the deposition could be used by the parties in this case?

Mr. Wynn: Stipulated that the deposition could be used by the parties in this case. [193]

Mr. Heily: Yes.

The Court: Was it stipulated this deposition could be used?

Mr. Heily: In evidence in this case?

The Court: In evidence in this case.

Mr. Heily: Yes.

Mr. Wynn: I don't recall such a stipulation. I recall the reading of various portions of the deposition, including the——

The Court: I assume if it was stipulated the deposition could be used, there was also an implied stipulation that the deposition had been taken properly and signed properly. Now, I am just wondering, if there had been any objection raised to the use of the deposition, whether I was correct in allowing the deposition to be used, because whoever took this deposition doesn't know anything about taking a deposition. Now, if the deposition had been taken and it followed the procedure, that is, if they had taken the deposition and within a few days or weeks had presented this deposition to the witness for signature, and then he had made the correction, then I would feel that the instruction was proper, but here we have got a wait of a year, practically speaking, because as far as the evidence shows this deposition was not sent to the witness. It was not taken to the witness. He was called into the attorney's office before someone who did not take the [194] deposition, and then he read the deposition and made the correction. That is not what the statute says you can do.

The statute says it should be corrected before the one who takes the deposition, and that party should initial it. There is no initialing as far as the notary is concerned. I think the deposition certainly is subject to a lot of criticism.

Now, if this correction had been made promptly, then I think that this instruction would be proper,

but inasmuch as it is a year later, then I think it is wrong to say to the jury, "You may consider the correction made a year later as some evidence of whether or not it was willful, false and deliberate when it was made a year before."

Mr. Heily: It wasn't a year later. It was approximately four and a half to five months later.

Mr. Wynn: Between the original taking of the deposition and the time he signed, approximately five months. Between the time he signed it and the corrections made or the changes made, and the original statement contrary to fact in July, 1949, approximately nine months.

The Court: Well, I think there has been such a delay here that if this had been prompt, I would have given the instruction. Inasmuch as it was not prompt, I am going to refuse H.

Mr. Heily: Would it be a fair consideration to instruct [195] the jury somewhat in this manner, then, "You are instructed you may take into consideration the fact that the attorneys for Towry did not present the deposition to him for correction"?

The Court: No. There is no evidence in this case as to why—I raised that issue during the trial. I wanted to know the reason. I was interested in knowing the reason why.

Mr. Heily: It isn't the reason why, is it, so much as the mere fact that it was not presented to him?

The Court: Somebody slipped up on this. I assume it was the notary that didn't follow through.

Of course, I think the attorneys for the plaintiff should have seen that the notary did follow through.

I don't think Hollingsworth is absolved from blame, because Hollingsworth was the one who was causing the deposition to be taken. He should have seen the the deposition was taken properly and was presented promptly, was signed and corrected.

Mr. Wynn: Just a comment. Everyone has been faced with that sometime or other, and you sometimes find a deposition you have taken has never been signed, and where is the witness? You kick yourself.

The Court: You might have been in a very difficult place here if you had relied upon the deposition and then you could show it wasn't signed before the notary taking the [196] deposition and corrected. But I think there was a stipulation the deposition can be used and that stipulation cured the defects of the taking. I don't know.

Instruction I is Mack 16.

Mr. Heily: H is disallowed?

The Court: Yes.

Mr. Wynn: Well, my note originally was that this instruction was not applicable, but I suppose I am wrong. I mean the instruction, "If you believe he did not violate the terms of the policy, your verdict should be in favor of the plaintiff."

The Court: Isn't that the whole issue here?

Mr. Wynn: I suppose it is, yes.

The Court: If they decide this case on any other issue, I will set the verdict aside. That is the

whole issue, the issue of cooperation. I was afraid yesterday you were going to get trying the other lawsuit all over again.

Now, J, that is Mack 17.

Mr. Wynn: I have no objection to that. The only thing I have marked was Mack, and you have changed that to plaintiff.

The Court: Yes. That is why I rewrote these. K is 18. When I passed on this, I had read some of these cases that were suggested, and there is a case to the effect that the insurance company doesn't have to show it was prejudiced, if it [197] was a deliberate misstatement. I don't think the company has to show it relied upon that misstatement or was prejudiced by the misstatement. There is a case to that effect.

Mr. Wynn: My objection to this instruction was, "prejudice and matter of law." That is the very case which was cited by Mack in support of this instruction, that Valladao vs. Firemen's Fund, 13 Cal. 2d. Likewise the decision of the Ninth Circuit in the Home Insurance Company in 167 F.2d, 919. That prejudice was a matter of law and, of course, your Honor, based on those cases, that it is a matter of law and the decisions in those cases, that the false statement of a fact material to the accident is as a matter of law prejudice, and the Valladao case supported the judgment notwithstanding the verdict.

The Court: I am going to refuse K. I want to be very careful here, if I can be careful, because if

the plaintiff gets a verdict, I don't want a reversal on appeal. That was K. This is L. L is 21.

Mr. Wynn: Shall I just speak up?

The Court: Yes.

Mr. Wynn: My objection is, specifically, the words "unintentional and accidential" in line 7. My note is that under the evidence, the undisputed evidence, it cannot be said that his statement that, "I did not drink any beer on that date," was unintentionally made or accidentally made. The [198] only evidence is that that was a false statement and admittedly false, so here, to tell the jury that any statements which were unintentional and accidental are not violative of the policy, is instructing on a matter which is not within the evidence, the only evidence being that he did intentionally make a false statement.

The Court: If it was not for the question of beer, I would overrule you, because he testified he didn't think that beer was hard liquor, but the question was asked about beer particularly. There is no question about that.

Mr. Wynn: And the question was asked, "Did you go into a specific cafe?" and he said, "No." So I say that there was no evidence that the statements were unintentionally made. He may have thought it didn't make any difference.

Mr. Heily: Your objection is based on a false premise. There is no evidence on which it can stand, and there is this evidence concerning the statement which said, "I did not use any intoxicating liquor." The evidence shows he meant hard

liquor, not beer, and that was an unintentional statement.

The Court: But your proposed instruction doesn't restrict itself to one instance.

Mr. Heily: It says any.

The Court: It says any. I think the objection is good. I am going to refuse L.

Now, if we will get back to the plaintiff's [199] instructions, does the defendant have any objection to the proposed plaintiff's instructions I have indicated? We are not talking about the instructions I have refused, but the ones I have indicated I will give. Let's take up the plaintiff's instructions first.

Mr. Wynn: The first one I wished to comment on is plaintiff's No. 9.

The Court: All right.

Mr. Wynn: "As to what constitutes lack of cooperation, the jury is instructed that to prove it, the insurance company must show there is a failure to cooperate in a substantial material respect, and that a technical or inconsequential lack of cooperation then on a misstatement of fact is immaterial." I do not think that correctly expresses the law, the jury being told that a misstatement of fact to the insurance company is immaterial.

Mr. Heily: Let's amend that to insert before the word "misstatement," "technical or inconsequential."

Mr. Wynn: Then that is a duplication.

Mr. Heily: It is a matter of phraseology, as far as I can see.

Mr. Wynn: I suggest that I felt defendant's instruction No. 12——

The Court: Why can't we stop after the word "respect" on line 5? "The company must be sure that there is a failure [200] to cooperate by Towry in some substantial and material respect."

Mr. Wynn: I think so.

Mr. Heily: I think the jury has to know the difference between a material and immaterial thing there.

The Court: I don't know. The jury may come to a different conclusion than I do. I think it is immaterial. The jury may think it is material. I don't know how you define material.

Mr. Heily: That is what we are trying to do in accordance with the law.

Mr. Wynn: If it is fair to refer to defendant's 12 to save time——

The Court: Defendant's 12?

Mr. Wynn: It follows very shortly.

The Court: I don't want to make any duplication, if I can help it, because I think a jury does pretty well to keep track of what it gets.

Mr. Wynn: In 12, I ask for the instruction to the jury to determine whether Towry made misrepresentations of facts to this defendant concerning the accident or the surrounding circumstances which were not mere matters of opinion or which were not of such a nature as to be excusable upon the ground of forgetfulness or mistake.

Mr. Heily: That would amount to a directed verdict. [201]

Mr. Wynn: He has the technical or inconsequential, and the misstatement of fact. Now, if a man would be asked, "When were you born?" and he should say, "December 25, 1908—no, I am wrong in that. I meant 1906," that might be technical or inconsequential. Such misstatements, it is true, are not good to void a covenant, but here in No. 9 as requested, the jury is told that a misstatement of fact is immaterial.

Mr. Heily: No, they are not told that.

The Court: No. In some material respect.

Mr. Wynn: And that an inconsequential——

Mr. Heily: Just add the words "technical or inconsequantial" before "misstatement" and your objection is answered.

Mr. Wynn: Then No. 15, your Honor, reading, "In order for a falsification to constitute non-cooperation, you are instructed that the falsification must be willful, deliberate and concerning a material fact," I have no objection to that, but in No. 9 they say, "A misstatement of fact is immaterial."

Mr. Heily: Inconsequential and technical misstatement of fact is what we are saying, and that is the law. That is definitely the law. If there is any concern about the way the language is written there, out of an abundance of caution, I am suggesting before the word "misstatement" in line 6, the words "technical or inconsequential" be inserted, and that will take care of your objection entirely. [202]

The Court: Let's see. Is this satisfactory?

As to what constitutes lack of cooperation in this case, you are instructed that to prove there is a lack of cooperation, the Standard Accident Insurance Company must show there is a failure to cooperate by Towry in some substantial and material respect. You are further instructed that the misstatement of fact made to the insurance company, if you find it was so made, must be material.

In other words, I agree that the insurance company should not avoid its liability upon some technical or inconsequential ground, so I say it must be a material matter. Doesn't that meet your objection?

Mr. Wynn: Yes. I would then say it is duplicated by Instruction No. 15. I am not trying to be capricious.

The Court: I am going to give No. 9 as amended. Fifteen states it a little different way. Any other objection?

Mr. Wynn: No. 10.

The Court: Do you want the record to show you object to 9 as amended?

Mr. Wynn: I object to 9 and 15 as being duplicates.

The Court: All right. The next is No. 10.

Mr. Wynn: No. 10 is based on Pacific Indemnity vs. McDonald, a case arising in Oregon, the decision itself being expressly based on Oregon law. The court pointed out that the law in Oregon must be decisive. The record shows that the [203] delay in that case in correcting or changing the original statement made to the insurance company was one

week only, from August 15th to August 22nd, or the 18th to the 25th. The decision expressly distinguishes the Pacific Indemnity Company vs. McDonald case from another Oregon decision, the citation of which I can't give you, but it is in 107 F. 2d.

The delay had been months in correcting, and in the Pacific Indemnity vs. McDonald case, the court says in so many words, had there been a long or longer delay in correcting the misstatement, plaintiff could not recover under the ruling in the Kimineta case, another Oregon case. I have the citation here.

To tell the jury in this case that the prompt withdrawal of a falsehood cures the defect is to suggest to the jury that the court feels that a withdrawal five months later is a prompt one.

The Court: Of course, we have got that question again. Here is this witness, who never had a deposition taken before. He was called in to take his deposition. He knew nothing about the procedure.

Mr. Wynn: He was sworn to tell the truth.

The Court: He was sworn to tell the truth. Now, the statute provides that when you provide that he can look at his deposition and correct it. I don't know when the misstatement is made, when it was taken by the reporter or when [204] it was corrected. I don't know what the law is. I don't know whether or not until he has the opportunity to correct it, there is a misstatement.

Mr. Heily: The evidence is as early as 10 days after the deposition, the insurance company knew of the misstatement.

The Court: There is no question here. This

raises the question about prejudice to the insurance company, whether the insurance company was prejudiced. I think the rule is if there is a deliberate misrepresentation or misstatement to the insurance company, that the insurance company doesn't have to go on and say it is prejudiced by that misstatement.

Supposing you take a deposition today and there is a deliberate misrepresentation. The insurance company goes ahead and the trial is not for two years. Now, can you say that the insurance company has to show it was prejudiced within two weeks or three weeks?

Mr. Heily: I think you have to, yes.

The Court: I think 10 is objectionable. I am going to refuse 10.

Mr. Wynn: No. 15, I have no objection to, except as stated in connection with 9, that it is a duplication.

The Court: I will overrule the objection on 15.

Mr. Wynn: I have no objection to No. 16.

Mr. Heily: Then that is all. [205]

The Court: Now, has the plaintiff any objection to the defendant's instructions?

Mr. Heily: No. 2 is all right.

The Court: The defendant gives the California jury instructions. The only question is whether or not they are applicable in the case.

Mr. Heily: No. 4 is okay. Six is all right. Twenty is all right. Nineteen is okay. Eighteen is okay. Seventeen is okay. Eight is okay. Nine is okay. Seven is okay.

Mr. Wynn: As a matter of fact, my 7 and your 8 are based on the same form. I think they are both proper. The question is whether both should be given.

The Court: I don't like to give more instructions than necessary. I think the jury has plenty to do if they can keep track of the instructions given, and if there is any duplication here, I want to cut it out.

Mr. Heily: I think either one can go out.

The Court: Which are they?

Mr. Wynn: Defendant's 7 and plaintiff's 8. My form is a slightly longer statement. They are both directed to the same thing.

The Court: You say your 7?

Mr. Wynn: Yes.

Mr. Heily: And my 8.

The Court: I think I will eliminate the longer one, [206] which is the defendant's 7.

Mr. Wynn: Yes. I will put on here "covered elsewhere."

The Court: Now, do you want to make a note of the instructions I am going to refuse to give or I have indicated I am going to refuse?

Mr. Heily: Let me finish first.

The Court: I thought you had finished. Excuse me. I don't want to hurry you, or anything like that.

Mr. Wynn: No. 11 should be corrected in line 2 to say, "this action is," rather than, "these actions are."

The Court: Which one is that?

Mr. Wynn: My No. 11.

The Court: Defendant's 11. "Upon which this action is brought." That shall be corrected by changing the words "these" to "this" and "are" to "is."

Mr. Heily: I would like to leave my discussion of that one until I finish the rest of his and combine it with something else I have in mind.

The Court: Go ahead.

Mr. Heily: No. 12 of the defendant, I object to on the grounds it gives the implication of a directed verdict. It states, "It is your duty to determine whether or not misrepresentations of facts to this defendant are not mere matters of opinion, which were not of such a nature as to be excusable on the ground of forgetfulness or mistake." That is covered [207] by other instructions on materiality.

The Court: I gave your instruction that is comparable to this.

Mr. Heily: Yes. I say it is covered by mine and this, I think, has a tendency to confuse the jury and give them the impression that they must, and if they determine that he did make a falsification, they must find in favor of the defendant, and it is admitted he made a false statement.

The Court: I don't agree with you at all. I am going to overrule the objection.

Mr. Heily: I object to 14 on the same ground. That is in the nature of a directed verdict. They must take into consideration the circumstances, as well as the truthfulness or falsity of his statements.

The Court: That is pretty nearly the words of this federal case. I read that federal case.

Mr. Heily: The words out of the Oregon case are the words for that case.

The Court: We are not bound by Oregon, but we are bound by the Federal Reports. I will overrule the objection on 14.

These cases repeat and repeat and repeat that truthfulness is the keystone, and I have instructed it must be material, so I think 14 is all right.

Mr. Heily: No. 15, I object to on the ground they must [208] consider for the purpose of determining whether the statement was material or not the facts surrounding the actual trial of the case.

The Court: Nothing that happened after the case started could affect this problem, could it?

Mr. Heily: It could determine whether the statement was material or not. I have maintained that throughout.

Mr. Wynn: That is 15?

The Court: That is 15.

Mr. Heily: The disclaimer of liability is on the grounds of a material falsehood. "To determine whether it is material, you must find"——

The Court: There is one question I am wondering about. You contend it is disclaiming your responsibility. You attempted to disclaim your responsibility. In other words, the trial judge in the Superior Court wouldn't let you terminate your responsibility, and you are even here attempting to disclaim your responsibility. This may be objectionable, because it may lead the jury to the conclusion you have disclaimed your responsibility.

Mr. Wynn: Well, of course, I had a little trouble phrasing this. I first phrased it, "until March 13, 1950, upon which date the defendant Standard Accident delivered to the assured its notice that it disclaimed any responsibility."

Then I thought, no, that is instructing upon [209] facts which may not be in evidence. So I said, "Its disclaimer, if you find that the defendant made such disclaimer."

Mr. Heily: I don't think you can limit it to that point. The disclaimer itself indicates you still had to withdraw, and you actually didn't get withdrawn.

The Court: I don't think it is an issue in this case whether or not you did disclaim. You are still here. You might have disclaimed.

Mr. Wynn: I was going to make that same comment, too.

The Court: You are still here, at least in this trial court, and this court feels you are still here. I hope you are still here. I think maybe the objection is good. I will refuse 15.

Mr. Heily: No. 16, I make the same objection.

The Court: 16 only says, "You are not to speculate," and I think that is the law. I will overrule your objection on 16.

Mr. Heily: Then we come back to 11. I would like to have you look at my 13 which you are not going to give.

The Court: 13 that we are not going to give?

Mr. Heily: Yes. My 13 is definitely the law. "If the insurance company improperly demands information"——

The Court: There is nothing in this case to indicate there has been an improper demand. You may argue the representative of the insurance company suggested this thing be [210] kept quiet.

Mr. Heily: That is the basis on which the law is the insurance company cannot present a sham or false defense.

The Court: I know, but that is only one of these instances. You have got a lot of instances here in which there is no question of an improper suggestion. I think my ruling on 13 is proper.

Mr. Wynn: I do, too. That would be dangerous.

Mr. Heily: Then I think we should add before the word "demanded" in line 6, the word "improperly demanded."

The Court: There is nothing in this case to show the insurance company has ever improperly demanded anything.

Mr. Heily: Yes, there is. The evidence that the insurance company advised him to keep quiet.

The Court: Advising and demanding are two different things. It may be you have some evidence that there was a suggestion on the part of the adjuster that it be kept quiet, but there is nothing to say they demanded it.

Mr. Heily: Then I think we should have an instruction that would cover that very situation, something to the effect that, "You are instructed if the cooperation of Mr. Towry was improperly advised or suggested"——

Mr. Wynn: But there is no assertion that he——

The Court: I am going to give 11.

Mr. Heily: Without the amendment? [211]

The Court: Without the amendment.

Mr. Heily: Then I think I should have an instruction in there that if there was any evidence that it was improperly suggested to him that he withhold information, they should take that into consideration.

The Court: The main issue here, as I see it, is what happened at the time the deposition was taken, and this suggestion came up a long time later.

Mr. Heily: About a month later.

The Court: All right. The fact that a week after he made these statements somebody suggested he shouldn't change his testimony certainly doesn't throw any light on whether it was willful, deliberate or intentional.

Mr. Heily: I think it does.

The Court: I am going to overrule the objection. For the purpose of the record, do you have any objection to the instructions that I have indicated I am not giving that you have requested?

Mr. Heily: That one, No. 13, I object to that.

The Court: I want you to make your record of your objections now.

Mr. Heily: I object to it as not being given, because I think it is a fair and honest statement of the law as it applies to this case.

The Court: All right. Do you have any [212] other objections?

Mr. Heily: To those you are not giving?

The Court: Yes.

Mr. Heily: Other than what I have already voiced?

The Court: Yes, the ones I have indicated I am not going to give, not the ones I indicated I was going to give, and then struck out, but the ones I eliminated originally.

Mr. Heily: Yes. I object to failing to give No. 11 following the language in Rockmiss vs. New Jersey Manufacturers Association Insurance Company.

The Court: You can have your objection.

Mr. Heily: I object to your not giving No. 12, also.

The Court: You can have your objection on 12.

Mr. Heily: There is evidence showing he did not ask him concerning beer, and under that case the insurance company cannot complain that that is non-cooperation.

I believe No. 14 is covered by the quotation from the statute, isn't it?

The Court: Yes. I have given the statute itself. I think that is the proper way to do it, rather than an opinion as to what it says. I don't think your 14 is proper, because you can take a sworn statement and then you can stipulate it can be used.

Mr. Wynn: Those are the notes I had.

The Court: Why, surely. You may be right as far as you [213] go, but you don't go far enough.

Mr. Heily: That's all.

The Court: Now, do you have any objections to the instructions I have refused to give of yours?

Mr. Wynn: Yes. My proposed instruction No.

10, which is intended to be only a statement of the law that the plaintiff in this action stands in the shoes of Towry, and any defense available against Towry is available against the plaintiff, that is the gist of it. I don't see that that is covered by any other instruction given.

The Court: Maybe counsel will agree that is the law, that one who attempts to recover from an insurance company does not stand in any better position than the insured.

Mr. Heily: I don't think it is in issue here at all. It is certainly the law.

Mr. Wynn: I think it is only safe to tell the jury, knowing as we know how juries sometimes get a different idea.

The Court: You don't know what a jury uses to decide a case.

Mr. Wynn: I tried to explain it to my son yesterday, and he couldn't see why they are suing again when they have already sued, and I had to explain they can only recover in the position of Mr. Towry.

The Court: But here is the vice of your instruction. This jury might feel that Towry shouldn't recover on wilful [214] misconduct. However, they may not feel a third party may not recover. In other words, Towry, you have alleged and you have got in the record now that there was this issue of wilful misconduct. Now, they may feel Towry shouldn't recover. They may feel they wouldn't give a judgment to Towry. But here is a stranger.

Mr. Wynn: And that is just what the law says,

that that poor stranger is tarred with the same brush that tars Towry.

The Court: I am inclined to believe that a stranger cannot have any more rights against an insurance carrier than the insured himself. The only question is whether it is material.

Mr. Wynn: Is it material to advise the jury in this case that that is the situation?

The Court: Of course, if I am going to err, I would rather err in giving the instruction than in keeping it out.

Mr. Wynn: I don't feel strongly about it, except I do believe that is the law and I think it would be well for the jury to know that.

The Court: I am going to still hold to my guns. I don't think it is a material issue here, although I think it is a correct statement of the law but, nevertheless, I don't think we should present to this jury a lot of correct statements of law on matters that are not of importance. [215]

Mr. Wynn: My next and last is No. 13. In that I am admittedly making a request for an instructed verdict.

The Court: That is the thing I would certainly lean over backwards not to give.

Mr. Wynn: I am asking the court to instruct if they would find he did make a deliberate misrepresentation as to consuming liquor, that is prejudicial as a matter of law and there can be no recovery.

The Court: I am going to refuse to give it.

Mr. Wynn: That's all.

The Court: If we were trying this case without a jury, I don't know, we might have to decide the case in a different way. That's all. We have got an hour now.

(Thereupon, a recess was taken until 2:00 o'clock, p.m.) [216]

March 29, 1951—2:00 P.M.

(The following proceedings were had outside the hearing and presence of the jury:)

Mr. Wynn: If the court please, counsel on behalf of the defendant Standard Accident Insurance Company wishes at this time to move the court for its order directing the jury in this cause to return its verdict for the defendant. This motion is made upon the following grounds:

One, there is no conflict in the testimony or arising from the evidence introduced in this action on the issue as to whether or not the assured under the policy issued by the defendant made conflicting statements of fact to the insurance company. It is, in fact, conceded that the insured did make conflicting statements.

Apart from the concession, I direct the court's attention to defendant's Exhibit D, I believe, which is the statement of July 11, 1949, in which the assured stated over his own signature that he had drunk no intoxicating liquor on the date of the accident.

Secondly, where there is no conflict or no substantial conflict in the evidence introduced in an

action seeking recovery upon an insurance policy, a public liability insurance policy, as to the facts concerning the representations made, the matters of materiality and of prejudice to the [217] insurance company, are purely questions of law, not for submission to a jury, but for decision by the court. The authorities I wish to refer to are, of course, Valladao vs. Firemen's Fund Indemnity Company, a decision by the California Supreme Court dated April 21, 1939, reported in 13 Cal. (2d) at 322.

Very briefly—I know court and counsel are familiar with the facts in that case—it appeared that the insured originally reported to the insurance company and on several subsequent occasions reiterated his assertion, that he himself was not driving the automobile which was involved in the collision. Shortly prior to the date of trial, the insured, accompanied by counsel retained by him individually, called upon and advised counsel representing the insurance company that the statements previously made as to the asserted fact that he was not driving the automobile were false. It was further developed and appears from the opinion of the Supreme Court of California that the person who was in fact driving the automobile was the person insured under the terms of the policy. The jury returned a verdict in favor of the plaintiffs and against the insurance company.

The Court: I wish you would make your motion and give me your authorities. I am allowing you to make a record, but it isn't necessary to go into the cases.

Mr. Wynn: I shall cite them, shall I? [218]

The Court: Yes.

Mr. Wynn: The case of Home Indemnity Insurance Company of New York against Standard Accident Insurance Company, reported in 167 Fed. (2d) at page 919. Specifically, I refer to the language in that opinion appearing on 923, and in the Valladao case, page 330, and following.

On the authority of those cases, the defendant asserts that as a result of the undisputed testimony, that conflicting statements were made by assured, prejudice is presumed as a matter of law, that the misstatements are in violation of the assured's agreement to cooperate, and that the assured is precluded from recovery in this case.

The Court: The cases seem to indicate the question of whether or not there was cooperation is a question of fact and not a question of law. The motion is denied.

Mr. Heily: At this time, your Honor, on behalf of the plaintiff Winget, I move for a directed verdict in her favor on the ground that the representations made by the assured were made to others than the insurance company, and the evidence shows in every respect that he cooperated with the insurance company.

The Court: I will overrule your motion on the same grounds as I overruled the defendant's motion. That is a question of fact for the jury and not a question of law.

Call down the jury. [219]

I want to instruct this jury before the recess,

so I would like to limit each of you to 30 minutes to the side for argument. Argument that extends over 30 minutes loses its effectiveness.

(The following proceedings were had in the hearing and presence of the jury:)

The Court: Is it stipulated the jury is present and in the box?

Mr. Wynn: So stipulated.

Mr. Heily: So stipulated.

The Court: You may proceed.

(Argument of counsel for plaintiff and defendant not transcribed.)

The Court: Ladies and gentlemen of the jury, it becomes my duty as judge to instruct you on the law that applies in this case, and it is your duty as jurors to follow the law as I shall state it to you. On the other hand, it is your exclusive province to determine the facts in the case, and to consider and weigh the evidence for that purpose. (The authority thus vested in you is not an arbitrary power, but must be exercised with sincere judgment, sound discretion and in accordance with the rules of law stated to you.)

If in these instructions, any rule, direction or idea be stated in varying ways, no emphasis thereon is intended by me, and none must be inferred by you. For that [220] reason, you are not to single out any certain sentence, or any individual point or instruction, and ignore the others, but you are to con-

sider all the instructions and as a whole, and to regard each in the light of all the others.

At times throughout the trial the court has been called upon to pass on the question of whether or not certain offered evidence might properly be admitted. You are not to be concerned with the reasons for such rulings and are not to draw any inferences from them. Whether offered evidence is admissible is purely a question of law. In admitting evidence to which an objection is made, the court does not determine what weight should be given such evidence; nor does it pass on the credibility of the witness. As to any offer of evidence that has been rejected by the court, you, of course, must not consider the same; as to any question to which an objection was sustained, you must not conjecture as to what the answer might have been or as to the reason for the objection.

It is your duty as jurors to consult with one another and to deliberate, with a view to reaching an agreement, if you can do so without violence to your individual judgment. You each must decide the case for yourself, but should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. However, you [221] should not be influenced to vote in any way on any question submitted to you by the single fact that a majority of the jurors, or any of them, favor such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning

a verdict or solely because of the opinion of the other jurors.

You must weigh and consider this case without regard to sympathy, prejudice, or passion for or against any party to the action.

That attitude and conduct of jurors at the outset of their deliberations are a matter of considerable importance. It is rarely productive of good for a juror, upon entering the jury room, to make an emphatic expression of his opinion on the case or to announce a determination to stand for a certain verdict. When one does that at the outset, his sense of pride may be aroused, and he may hesitate to recede from an announced position if shown that it is fallacious. Remember that you are not partisans or advocates in this matter, but are judges. The final test of the quality of your service will lie in the verdict which you return to the court, not in the opinions any of you may hold as you retire. Have in mind that you will make a definite contribution to efficient judicial administration if you arrive at a just and proper verdict in this case. To that end, the court would remind [222] you that in your deliberations in the jury room there can be no triumph excepting the ascertainment and declaration of the truth.

A witness false in one part of his testimony is to be distrusted in others; that is to say, you may reject the whole testimony of a witness who wilfully has testified falsely as to a material point, unless, from all the evidence you shall believe that the probability of truth favors his testimony in other particulars.

In judging the credibility of witnesses, you shall have in mind the law that a witness is presumed to speak the truth. This presumption, however, may be overcome by contradictory evidence by the manner in which the witness testifies, by the character of his testimony, or by evidence that pertains to his motives.

The testimony of one witness worthy of belief is sufficient for the proof of any fact and would justify a verdict in accordance with such testimony, even if a number of witnesses have testified to the contrary, if from the whole case, considering the credibility of witnesses and after weighing the various factors of evidence, you should believe that there is a balance of probability pointing to the accuracy and honesty of the one witness.

You are not bound to decide in conformity with the testimony of a number of witnesses, which does not produce conviction [223] in your mind, as against the declarations of a lesser number or a presumption or other evidence, which appeals to your mind with more convincing force. This rule of law does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice, or from a desire to favor one side as against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. It means that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence.

Evidence may be either direct or indirect. Direct evidence is that which proves a fact in dispute directly, without an inference or presumption, and which in itself, if true, conclusively establishes the fact. Indirect evidence is that which tends to establish a fact in dispute by proving another fact which, though true, does not of itself conclusively establish the fact in issue, but which affords an inference or presumption of its existence. Indirect evidence is of two kinds, namely, presumptions and inferences.

A presumption is a deduction which the law expressly directs to be made from particular facts. Unless declared by law to be conclusive, it may be controverted by other evidence, direct or indirect; but unless so controverted, the jury is bound to find in accordance with the presumption. [224]

An inference is a deduction which the reason of the jury draws from the facts proved. It must be founded on a fact or facts proved and be such a deduction from those facts "as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature."

You shall not consider as evidence any statement of counsel made during the trial, unless such statement was made as an admission or stipulation conceding the existence of a fact or facts.

You must not consider for any purpose any offer of evidence that was rejected, or any evidence that

was stricken out by the court; such matter is to be treated as though you never had known of it.

You are to decide this case solely upon the evidence that has been received by the court, and the inferences that you may reasonably draw therefrom, and such presumptions as the law deduces therefrom, as noted in my instructions, and in accordance with the law as I state it to you.

You are instructed that the assistance and cooperation provisions of the policy that Billy Ray Towry had with Standard Accident Insurance Company read as follows:

> "Assistance and Cooperation of the Insured—Coverage A * * * The insured shall cooperate with [225] the company and, upon the company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining and attendance of witnesses and in the conduct of suits. The insured shall not, except as his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of accident."

Under the terms and provisions of the contract of insurance upon which this action is brought, it became and was the duty of the assured Billy Ray Towry to give a fair, frank, honest, and truthful disclosure of any information in his possession demanded by or on behalf of the defendant concerning facts and circumstances surrounding the accident in which he was involved.

You are instructed that the Standard Accident Insurance Company is contending that there was a breach of the cooperation clause of its policy with Billy Ray Towry by him. This is an affirmative defense and the burden of proof is on the Standard Accident Insurance Company to establish this defense by a preponderance of all the evidence in the case and if it fails to do so, your verdict on the issue of cooperation should be in favor of the plaintiff and against Standard Accident [226] Insurance Company.

Whenever in these instructions I state that the burden, or the burden of proof, rests upon a certain party to prove a certain allegation made by him, the meaning of such an instruction is this: That unless the truth of that allegation is proved by a preponderance of the evidence, you shall find the same to be not true.

The term "preponderance of the evidence" means such evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability of truth lies therein.

It is your duty to determine whether the said Billy Ray Towry made misrepresentations of facts to this defendant concerning the accident or the surrounding circumstances which were not mere matters of opinion or which were not of such a nature as to be excusable upon the ground of forgetfulness or mistake.

In order for a falsification to constitute non-cooperation, you are instructed that the falsification

must be wilful, deliberate and concerning a material fact.

As to what constitutes lack of cooperation in this case, you are instructed that to prove there is a lack of cooperation, defendant Standard Accident Company must show that there is a failure to cooperate by Towry in some substantial and material respect, and you are further instructed that that [227] misstatement of fact made to the insurance company, if you find it was so made, must be material.

Concerning what is required from an assured to satisfy his obligation to cooperate with the insurer, you are instructed that truthfulness is the keystone. The insured must tell his insurer the complete truth concerning the accident and he must stick to this truthful verious throughout the proceedings. He must not embarrass or cripple his insurer in its defense of a civil suit against him by switching from one version to another. Nothing is more dangerous to an insurer than an insured who deliberately falsifies the facts.

You are instructed that the law of the State of California permits the taking of what is known as the deposition of the parties to a law suit. In the action filed in the State Court by Vivian Delozier, now known as Vivian Winget, vs. Billy Ray Towry, Vivian Delozier had the deposition of the defendant, Billy Ray Towry, taken under the provisions of Section 2055 of the Code of Civil Procedure.

You are instructed that depositions under Section 2006 of the Code of Civil Procedure of the State of California may be taken as follows:

"Depositions must be taken in the form of question and answer. The words of the witness must be written down, in the presence of the witness, [228] by the officer taking the deposition, or by some disinterested person appointed by him. It may be taken down in shorthand, in which case it must be transcribed into longhand by the person who took it down. Such officer and the person taking down such testimony must be disinterested persons unless otherwise stipulated by the parties. When completed, it must be carefully read to or by the witness and corrected by him in any particular, if desired, by writing or causing his corrections to be written in the body or margin of or at the bottom of the deposition, and must then be subscribed by the witness. The officer before whom the deposition is taken must write his initials near said correction. If the parties agree in writing to any other mode, the mode so agreed upon must be followed."

You are instructed that the defendant, Standard Accident Insurance Company, contends that its assured, Billy Ray Towry, failed, refused and neglected to cooperate with it in securing and giving evidence and concealed evidence from Standard Accident Insurance Company and also made false and untrue statements in a sworn deposition intended for use upon the trial of an action filed in the Superior Court of Ventura County, [229] California.

If you believe that after the giving of his deposition and before correcting the same, Billy Ray Towry informed the Standard Accident Insurance Company of the fact that he had been drinking some beer on the day of the accident, to wit: January 26, 1949, then you may take that into consideration in determining whether or not Billy Ray Towry acted in good faith in his dealings with Standard Accident Insurance Company and whether or not he violated the cooperation clause of his policy.

If you find that the said Billy Ray Towry did fail to cooperate with the defendant as such *terl* has been defined to you, in these instructions, you may not speculate as to what might have been the final outcome of the actions against him in the event he had not been guilty of such failure.

You are instructed that if you believe, under the evidence of this case, that the defendant, Billy Ray Towry, did not violate the terms and provisions of his policy with Standard Accident Insurance Company respecting the cooperation clause already read to you, then I instruct you that your verdict should be in favor of the plaintiff and against the defendant, Standard Accident Insurance Company, upon the issues of cooperation or lack of cooperation.

I have had the clerk prepare two forms of verdict, which read as follows after the name of the case: [230]

> "We the jury in the above-entitled cause find in favor of the plaintiff Vivian Winget and against the defendant Standard Accident Insurance Company of Detroit, Michigan."

Then there is a place for signature and a place for the date.

The other verdict reads, after eliminating the heading:

> "We the jury in the above-entitled cause find in favor of the defendant Standard Accident Insurance Company of Detroit, Michigan, and against the plaintiff Vivian Winget."

And there is a place for signature of the foreman and the date.

You are to take these two forms of verdict with you to the jury room, and upon your retiring to the jury room, you are to designate one of your number as the foreman. The foreman will be your spokesman to this court.

After you have deliberated upon this matter and have come to a conclusion as to whether the verdict should be for the plaintiff or for the defendant, you shall have your foreman sign the proper verdict and notify the bailiff so that you can be returned to this court to give your verdict.

Do respective counsel have any objections to the instructions as read? [231]

Mr. Heily: None that haven't already been voiced.

Mr. Wynn: I haven't any other, your Honor.

The Court: Swear the bailiffs.

> (The jury then retired to consider on its verdict at 2:45 p.m., and returned to the court room at 4:15 p.m.)

The Court: Is it stipulated the jury is present and in the box?

Mr. Heily: So stipulated.

Mr. Wynn: So stipulated.

The Court: Ladies and gentlemen of the jury, have you reached a verdict?

The Foreman: We have, your Honor.

The Court: Will you give the verdict to the bailiff? The clerk will read the verdict.

The Clerk: "In the United States District Court, Southern District of California, Central Division.

"Vivian Winget, plaintiff, vs. Standard Accident Insurance Company of Detroit, Michigan, a corporation, Thomas B. Mack, etc., defendants, No. 12,327-HW.

"We the jury in the above-entitled cause find in favor of the plaintiff Vivian Winget and against the defendant Standard Accident Insurance Company of Detroit, Michigan. [232]

"ROBERT J. BERNARD,
"Foreman of the Jury.

"Dated: March 29, 1951, Los Angeles, California."

Ladies and gentlemen of the jury, is the verdict as presented and read the verdict of each of you? So say you all?

The Jurors: Yes.

The Court: Do you wish the jury polled?

Mr. Wynn: Waive the polling of the jury.

The Court: Ladies and gentlemen of the jury,

you are about to be discharged. I want to add my thanks to the thanks of the attorneys.

Mr. Heily: Thank you very much, ladies and gentlemen.

The Court: This has been a very interesting case, at least it has been to me, and it is always nice when we have a jury that will pay attention and that seems to assimilate some of the issues that are involved in a lawsuit. Some of the juries don't go that far, but I want to say to you this jury has been a very pleasant jury. You will now be discharged until you receive further notice from the clerk.

(The following proceedings were had outside the hearing and presence of the jury:)

The Court: There is still pending before the court a question of interest. As far as I know, the defendant hasn't [233] had an opportunity or hasn't presented any authorities. I think the matter should be set down for a day certain.

Mr. Wynn: That was going to be my suggestion, your Honor, and also in connection with a motion which I will wish to present for entry of judgment notwithstanding the verdict of the jury, which I believe under the law of California applied here must be made before entry of judgment upon the verdict of the jury. It is my understanding that delay may be made of entry of the verdict for the purpose of interposing that motion and a ruling thereon.

I would suggest that, counsel being willing, a

time be fixed convenient to the court for the presentation of that motion and the ruling with reference to the allowance of interest.

Mr. Heily: In that connection, your Honor, I would like very much if we could dispose of both matters today. So far as the time element is concerned, I think it would take just a few minutes as far as my presentation is concerned. I would like to get back to my office.

The Court: I don't feel I am qualified to pass on the motion for interest today. If I pass on it, I would probably hold against you, so if you are sincerely interested in this matter and believe you are right, you'd better make arrangements to come down another day.

Mr. Heily: Well, could we argue the motion today and [234] then have you take it under submission?

The Court: You will have to come back here if counsel makes a motion for judgment notwithstanding the verdict. As far as I know, he can make the motion now and I can set the matter down for argument at some other time, rather than have it today.

Mr. Heily: Do you feel you are not prepared today, Mr. Wynn?

Mr. Wynn: I think it would be imposing on the time of counsel and the court if I attempted now to argue the motion at length, because I would expect to——

The Court: I think counsel has a right to prepare.

Mr. Heily: I was under the impression Mr. Wynn was prepared. If he is not prepared, I will not ask for it.

The Court: I think he has a right to review the evidence, to reconstruct his research, in the light of the facts that have developed in the case.

Mr. Heily: I just wanted to get across, both to the court and counsel, my thoughts on it. If there are any requests for a continuance, I will be glad to go along with Mr. Wynn.

Mr. Wynn: Yes. I will request that a time convenient to the court be set down for the presentation of the motion by the defendant for judgment notwithstanding the verdict and the presentation by counsel for the plaintiff. [235]

The Court: I think I can probably hear this a week from tomorrow. That is on April 6th.

Mr. Wynn: That would be satisfactory to me.

Mr. Heily: At 10:00?

The Court: At 10:00 o'clock. May I suggest for the purpose of the record you make your motion now for a judgment notwithstanding the verdict, and then I will continue the matter until April 6 at 10:00 o'clock for further proceedings.

Mr. Wynn: At this time, in open court and after the return of the verdict of the jury in favor of the plaintiff and before entry of a judgment upon such verdict by the court, defendant Standard Accident Insurance Company moves the court for its order directing entry of judgment in favor of said defendant and against the plaintiff Vivian Winget.

The Court: The matter will be continued until April 6 at 10:00 o'clock for argument, and on April 6 at 10:00 o'clock we will also have the argument as to the question of interest.

There are two questions involved in interest. The first question is whether interest should be allowed upon the $10,000, and the more important question, I think, is whether interest should be allowed upon the entire judgment.

We will stand now in recess until 10:00 o'clock tomorrow morning. [236]

(Whereupon, further proceedings in the above-entitled action were continued to April 6, 1951.) [237]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 26th day of July, 1951.

/s/ S. J. TRAINOR,

Official Reporter.

[Endorsed]: Filed July 27, 1951. [238]

April 6, 1951, 2:00 P.M.

The Clerk: Vivian Winget vs. Standard Accident Insurance Company, No. 12327, for further proceedings.

Mr. Heily: Ready for the plaintiff.

Mr. Wynn: Ready for the defendant.

The Court: What is the disposition as to the defendant Mack?

Mr. Wynn: I am to receive in the mail this morning the papers from Mr. Hollingsworth in Venture, if the court please. The morning mail had not arrived, but I talked to Mr. Hollingsworth yesterday. That is to dispose of his participation in both actions, I mean his action.

The Court: I understood the stipulation of his judgment could be entered.

Mr. Wynn: That is correct, and he is forwarding to me a satisfaction of judgment. Then as to his participation in the Winget case, Mr. Hollingsworth was of the opinion that the proceedings at the trial disposed of him. He was asking for no affirmative relief in the Winget action, and he would simply be dismissed therefrom, he thought.

The Court: Inasmuch as Mr. Mack is out of this case, don't you think the proper move would be to make an order dismissing the defendant Mack as a defendant? Maybe I shouldn't dismiss him unless the plaintiff wants to make a [2*] motion to dismiss. Do you want to keep the defendant Mack in here?) You haven't proved any cause of action against Mack.

*** Page numbering appearing at top of page of original Reporter's Transcript of Record.**

Mr. Heily: Well, your Honor, we feel your ruling on the question of the pro rata distribution of the proceeds of the policy is against us. We would not want to consent to anything to——

The Court: I don't want you to do anything that is going to jeopardize your position.

Mr. Heily: That's the point.

The Court: If this matter goes up to the Circuit Court, I am quite sure that matter will be argued there and if the Circuit would decide you are entitled to a proration, rather than limited to $10,000, although they have settled with Mack, nevertheless you have got some other money to play with there.

Mr. Wynn: I wrote to Mr. Hollingsworth and Mr. Henderson stating that satisfaction of stipulated judgment was entered and I think there should be documents furnished to cover their dismissal as a defendant in the Winget action. In response to that, he called me and said, "We make no claim therein."

The Court: I will have a court room full of people here later, so I would like for you to present your motion and argument as rapidly as possible.

Mr. Wynn: I will, your Honor. In the first place, as [3] you recall, there was also the matter of disposing of plaintiff's claim that interest in any event should be allowed——

The Court: I will dispose of that when I dispose of your motion.

Mr. Wynn: I have a case I want to call your attention to on that in the Supreme Court of the State of California.

The Court: I am pretty well satisfied in the matter.

Mr. Wynn: May I give the court simply the citation on that case? 8 Cal. (2d) at page 476. The case is Sampson vs. The Century Indemnity Company. I ask the court to compare the language of the policy there with the policy in the case at bar and the decision of the court, which I think completely disposes of it.

At this time, I wish to present my argument upon the motions for judgment notwithstanding the verdict, which I understand under the federal rules is an argument upon the legal questions which were proposed at the time the motions for directed verdict were made. Those legal questions, I think, very simply, although perhaps not comprehensively, can be stated as follows.

First, whether an admittedly false statement concerning, in this case, the drinking of beer by the assured shortly prior to the time of the accident, is as a matter of law, a breach of the cooperative clause.

Secondly, and as an offshoot of that principle in [4] the event there is uncontradicted testimony or documentary proof that such a conflicting statement was originally made, as in this case by deposition, and subsequently recanted, must the insurer, in addition, prove that that statement was prejudicial to its interests in the proceeding in the lower court.

The Court: I intimated at the time of trial I

did not think the cases went so far as to require the insurance company to prove that they relied on it or that the statement was detrimental. I have gone along with you on that case. If you want to argue, I might change my position.

Mr. Wynn: I am saying these were the legal principles, if the court please.

Thirdly, the additional legal principles that despite the question of prejudice, entirely set apart from it, under the policy containing a provision, as does the policy in the case at bar in condition No. 11, a condition that no action shall lie on the policy unless as a condition precedent the insured shall have complied with all terms of the policy, that such a provision in the policy makes is unnecesary in any event to consider prejudice, and it need only be shown that there was a false statement in fact.

I assume that the court has considered and read the cases of Valladao in 13 Cal. (2d) and the Home Insurance Company in 167 Fed. (2d). In view of the court's indication [5] that argument might be limited here as much as possible, I will not go into those cases in detail at this time.

I would like to call your attention to two additional cases which I think have not formerly been cited in any writing submitted to the court.

The Court: Mr. Wynn, before you proceed, may I say this to you. We have a contract. Now, the first question that comes up upon a contract, I think, is whether or not the contract is to be interpreted according to its terms or whether it is to be interpreted otherwise.

The first question that arose in this case about the interpretation of the contract was the question relating to the question of the proration of the judgment. I held to the literal wording of the contract, saying that the limit on one individual would be $10,000. I interpreted that according to the literal meaning of the contract.

Now we come to subdivision 8, which says that the insured must cooperate with the company. Now, I have either got to follow a literal interpretation or I have got to go back and reverse myself on the other interpretation. In other words, I can't in one place say the contract speaks for itself, we will interpret it from a literal point of view, just what it says, and then later say, "Well, it doesn't mean what it says. It means something else."

In order to be consistent, I have got to either [6] hold that it meant that the limit was $10,000 to one individual and that it meant that the cooperation was with the company, or I am going to have to hold that the clause about $10,000 to one individual was not binding and, consequently, the cooperation with the company was not binding, it is cooperation with somebody else. There is my predicament.

Mr. Wynn: If I follow the court, you are suggesting that the cooperation clause here means that it must be concluded, as a matter of fact, that whatever the insured did was not cooperating. Do I make myself clear?

The Court: No. I am saying this. I am having in mind the ruling of the court and I am perfectly willing to accede. That was on the question of

whether or not the statements made to others than the insurance company were a failure of cooperation. If the insurance company, in other words, the representative of the insurance company, had gone to the hospital, had taken a statement from the insured, and had asked the question, "Had you been drinking?" and he said, "No," then I would say that was an evidence of non-cooperation, but that was not the case.

The Motor Vehicle Department went out and made an independent investigation. Somebody told the Motor Vehicle Department, I don't know who told them, that the insured was not drinking. The statement was prepared for him to sign and he signed that statement. [7]

Now, whether or not the information that was given by somebody else that he was not drinking, or the information that he gave to the Motor Vehicle Department, was a lack of cooperation, I don't know.

Mr. Wynn: Then we go in sequence from the accident report, which was offered and rejected, to the next document, which was the statement of July 11, 1949, the typewritten statement admittedly initialed and signed by the insured, which was admitted.

The Court: Which was admitted.

Mr. Wynn: Yes, which was admitted. That, I take it, the court would regard as a representation made to the insurance company of the facts therein contained.

The Court: Yes.

Mr. Wynn: And in such a statement, as I recall, the statement was made by the assured that there had been no drinking, or there had been no drinking of intoxicants, or something to that effect, the word beer not being mentioned in quotes.

The Court: Here is your problem. The question of cooperation is a question of fact. In other words, the document was admitted in evidence. You presented to the jury the fact that the insured had said that and that it was not true. Now, it was up to the jury to decide whether or not that was or was not cooperation. [8]

Mr. Wynn: Now, your Honor, that is where our paths begin to diverge.

The Court: All right.

Mr. Wynn: Because I submit that under the holding of the Supreme Court in the Valladao case, the Circuit Court for the Ninth Circuit in the Home case, and the decisions of the District Court of Appeals, in both of which hearings were denied in the Supreme Court, the Wright against Farmers case, in all of those the Appellate Courts have said that cooperation under the facts is not one of fact for the jury, but is a matter of law for the decision by the court, and they say, further, that where the evidence shows—in most of these cases documentary evidence shows that the insured made one statement, subsequently changed his version entirely, and made another statement, and there is no issue as to that fact, neither the jury nor the court can speculate as to what the results might have been otherwise

whether in fact the insurer was prejudiced in the trial of the case. These cases hold, and I submit they hold, that in such cases the violation of that clause is prejudice as a matter of law and cannot be said to be anything but failure of cooperation. Let me direct the court's attention in that particular——

The Court: Let me ask you another question before you direct my attention to something else. Under the present policy, in the state of California a person is required, or at [9] least assumed to have had an insurance policy or at least adequate protection before he drives an automobile. It used to be the theory that the driver of an automobile would take out a policy to protect himself. But don't you think that the trend today goes further than that? That is goes, not to the protection only of the insured, but the protection of the public?

Mr. Wynn: I do.

The Court: And under the present law, I don't know whether this was the law when the insurance policy in question was issued, but under the present law, I think the pedestrian on the street or the person driving in another automobile has just as much right to rely upon an insurance policy to protect them as the insured has to rely upon the policy to protect himself.

Mr. Wynn: Yes. That is an argument that was advanced in one of the dissenting opinions in one of these cases. I have forgotten which one it was. I can't give the name of the judge who advanced that argument, that there was a third party beneficiary contract when the policy was issued,

and the potential injured person was the third party beneficiary, and once an accident occured, he had a vested interest which could not be defeated. In effect, that was the reasoning.

The Court: I wouldn't go that far, that he had a vested [10] interest, but I do go this far, that the interest that he has, the protection he has, should not be taken away from him on a technicality. There should be very substantial evidence if you are going to take that protection away from the injured party.

Mr. Wynn: My opinion is that at the time this policy was written, which was in February of 1948, the law of California did not require of every driver of a motor vehicle a public liability insurance policy. That is No. 1.

The Court: It doesn't require it yet, does it?

Mr. Wynn: And, No. 2, that it does not require it yet. Those are my two answers.

The Court: The law, as I understand it, is in the event of an accident, if you do not have protection and do not take care of the judgment, then you lose your right to drive.

Mr. Wynn: That's right, but you don't have to have a policy then. You can put up security with the Division.

The Court: I assume that although you are supposed to have a driver's license to drive a car, there are a lot of people driving automobiles without a license or with a revoked driver's license. Excuse me for interrupting.

Mr. Wynn: That's all right. I want, then, to drive on to this point. In each of these cases, the four I am particularly relying on, the four cases in sequence, 13 Cal., [11] 33, 39, and the Circuit Court opinion, in each one of these cases it was suggested by the plaintiff, the injured party, that if all that happens in this case was that, and as a matter of fact, what harm did the misstatement do to the insurance company, we asked the jury to find, and the jury did find that it was not injured in any respect.

Take the Valladao case. The insured said, "I was not driving the car. Somebody else was driving it with my permission." It didn't make any difference as to the coverage of the policy whether the insured was driving the car or not. It was an omnibus clause that covered the man who ultimately conceded that in fact he was driving the car. So the plaintiff said, "What difference does it make that he made a false statement as to who was driving?" Not the slightest, as far as the liability of the insured was concerned, because somebody is liable anyhow.

So in this case, what difference does it make if this man lied when he was asked the specific question, "Did you drink any beer?" and he said "No." The jury said, "We all drink beer and we all go out and drive our cars, and what difference does it make if he lied about that?

But as the court stated in the Valladao case, and has repeated in the following cases, we can't speculate about that. The fact is that the law is if there

is a misrepresentation of a fact connected with the accident, if there is a [12] misrepresentation of such a fact, and there can be no question but that there was such a misrepresentation, the law is that that presumes prejudice to the insurance company and is a complete defense under the policy.

That is my position and I urge that it is completely supported by these cases.

In the Margelleti case, arising in San Diego, the facts were an accident occurred. The woman driver was seen by a representative of the insurance company, chatted with her, but took no statement from her. No report was made by her of the accident at all. She didn't report it. There isn't any claim she made a false statement. She didn't report about the accident. The plaintiff in that case, the injured person in that case, said, "Well, here we gave them every opportunity to go into all the facts and, as a matter of fact, they had everything available to them. It was a case of liability anyhow."

"No," said the District Court of Appeals, backed by the Supreme Court of California, "that wasn't it. In fact, she failed to cooperate in fact. There is no question that she didn't make any statement to the insurance company."

On the Wright case against Farmers, arising up in the San Joaquin Valley, Wright was a passenger, and Sellers the driver of an automobile. Sellers went to his insurance company, reported the accident, and after preliminaries which [13] aren't necessary, I mean the ultimate thing was that in

that case he finally verified an answer in which he denied allegations in the complaint which sought to impose the wilful misconduct law. He signed the answer, verified the answer, in which those were denied. At the trial, he got on the stand and testified to the contrary, testified that he was in fact driving the car at 70 miles an hour and that in fact his passengers complained, had said to slow down, and he hadn't.

Whereupon, the insurance company said, "All right, we are through," It was argued in that case, as it has been and will be argued here, what difference did it make? If he had told the insurance company the truth to start with it certainly was a case of liability, and what difference did it make, what prejudice was there to the insurance company that he didn't?

But the court says, "No, prejudice is presumed as a matter of law."

The Wright case, as I recall it, was an appeal from an order denying the defendant insurance company's motion for a directed verdict. The Margelleti case was an appeal after the jury verdict had been returned for the injured. The Valladao case, the original case, was an appeal by the injured person from a judgment of the trial court under a judgment notwithstanding the verdict of the jury, and the Home case was an appeal from Judge O'Connor's findings of [14] fact after a trial where the insured had made about three conflicting statements of his version of the accident, and Judge O'Connor tried the case and said, "Well, it is

obvious that it made no difference. His story, which he finally gave on the stand, was that he had fallen asleep at the time of the accident, and if he had given that story to the insurance company in the very beginning of the case, it wouldn't have made any difference in the final outcome."

So Judge O'Connor said, "There was a misrepresentation, but I find that the insurance company was not prejudiced. I find that it didn't make any difference in fact."

The Circuit Court for the Ninth Circuit said, in almost this language, that is what we are not permitted to do, to speculate.

Now, it is pointed out in all these cases, after that argument, that it is a matter of law, prejudice, and it must be. The court says, "We can't speculate as to what the insurance company might have done if it had known at the beginning. They might have settled the case on advantageous terms. But we can't now use our back sight and say, "Well, it is obvious that if the insurance company from the day of this accident knew that the man had been drinking beer, the final outcome of the litigation wouldn't have been changed one whit." [15]

I am only arguing the law. I can see no way to get around these cases. It is as a matter of law prejudicial once there is an undisputed misrepresentation of a factual statement which is related to the accident itself. Just as in the Valladao case, the insured made a misrepresentation of a factual matter relating to the accident: Was he driving or was he not driving? And what difference did it

make? The insured might have said to himself, "Well, there is coverage anyhow, but for reasons of my own, I choose to make that false statement," as against the case at bar where he was sworn to tell the truth and answered directly a question, "Did you drink any beer?" "No." That is a positive sworn statement under oath.

You can't avoid that. The assured on this stand in this court room said it was false when he said it, that the answer was false. Later on, he recants that story.

I say that neither the jury nor this honorable court can say, "Well, it didn't make any difference, I am satisfied it didn't make any difference, and whatever had been the story, the verdict of the jury in the lower court would have been the same. The insurance company couldn't have handled it any differently; therefore, it was not prejudiced."

I say we can't do that, and I rest upon the decisions of the Supreme Court of California and its denial of rehearing in 39 and 33 and in the judgment of the Circuit [16] Court in the Ninth Circuit.

The Court: Let's hear what Mr. Heily has to say about it.

Mr. Heily: If the court please, on the argument for directed verdict, I think the court hit the nail on the head in the beginning. Was the insured cooperating with the company or was he responding to questions by some other persons? Now, that is just one element. We contend he was not responding to questions by the insurance company, but to questions from somebody else, and he had the right

upon making these statements in the deposition to later correct that statement, and that was known to the insurance company.

The Court: How about the statement that was made and signed by him? There is an argument here. I think there is a very legitimate argument whether the statement that he signed at the hospital was a statement that was made to a stranger. The statement that he made in his deposition was a statement that he did not make to the insurance company representatives, but he made to the plaintiff's representatives. But we do have this one case, this one incident, when he actually made the statement to the investigator of the insurance company.

Mr. Heily: That is one where he said, "I did not drink any intoxicating liquor."

The Court: There is a definite statement made to the [17] insurance company.

Mr. Heily: All right, your Honor. I will argue that very point. Counsel for the defendant relies on this Valladao case, which is the first and the leading of the four cases that he has cited. I will quote to you a portion of the language in the Valladao case. It is generally established, and we shall not pause to refer to the authorities, that what constitutes cooperation or lack of it on the part of the insured within the meaning and effect of the cooperation clause is ordinarily a question of fact. This is so because a dispute not only exists as to the actual statements and conduct of the assured in the premises or because of the existence of an uncertainty as to the intent or motive underlying his

statements or conduct, so, your Honor, it is pointed out in that case it is a question of fact as to whether there was cooperation.

In other words, to determine whether there was cooperation, we must investigate the motives and the intent underlying the reasons why he made such statements, and that is exactly what we did. The major portion of his argument dealt with this matter of prejudice.

I tried this case from the plaintiff's standpoint strictly on the question of was there cooperation or wasn't there cooperation. I requested no instructions regarding this matter of prejudice. In my opening brief on the [18] case, I submitted no authorities regarding the matter of prejudice. The only thing we were concerned with here was whether there was cooperation or whether there wasn't.

Now, the jury has determined that there was cooperation, because they checked the motives and the statements underlying acts of the assured and determined in their opinion that he had cooperated, and especially that he had cooperated regarding a material matter. Perhaps he didn't cooperate regarding an immaterial matter. We are not admitting that but perhaps he didn't. But it is regarding material matters that we are concerned with, and he did cooperate.

So, your Honor, with the language of his leading case, there is no other decision the court can make but to deny the motion for directed verdict. It would be error for the court to allow it.

In the Valladao case, the court made another observation, that there should be substantial evidence of non-cooperation. That is correct. In the Valladao case, the insured denied time after time that he was even driving the car. In the Home Indemnity case, there were four or five statements, each and every one of them insisting upon a false matter of fact. He continued, the assured continued in the Home Indemnity case throughout the trial to assert the false statement of facts. [19]

Obviously in both cases there was very substantial non-cooperation, so substantial that the court was able to say without question that there was no cooperation.

But in this case, and in all the cases where there is some question as to whether he has cooperated or not, it is a question of fact for the jury.

Now, turning to the matter of interest, I believe I neglected to quote to you one of the clauses in this policy at the time I last discussed this question that is definitely important. In clause 2 of the insurance agreement, subsection B of that clause, it says the insurance company shall pay all interest accruing after entry of judgment until the company has paid, tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon.

Now, the closing sentence of that paragraph, II, reads as follows:

> "The company agrees to pay the amounts incurred under this insuring agreement, except

settlements of claims and suits, in addition to the applicable limit of liability of this policy."

Now, let us examine the case cited by counsel for the defendant, the Sampson case, 8 California (2d) 476. In that case we had language in the policy, very similar, almost exactly like this one, with this exception. There was no [20] language in that policy, in the 8 Cal. (2d) case, reading "The company agrees to pay the amounts incurred under this insuring agreement in addition to the applicable limits of the policy."

There is no such language. Therefore, the court said in that case that it hardly seems probable that the parties to the policy intended to make it liable for interest on any greater amount and, "Surely we would not be justified in so construing the policy unless it contains language clearly expressing such an intention."

Now, in our case before this court, we do have that language. It says, "All interest" on the judgment in addition to the applicable limit of liability of this policy.

That brings us down to a discussion of the New Jersey Fidelity case, 33 Fed. (2d). In that case the policy stated, "Irrespective of the limits of the policy, on liability hereinafter mentioned, the company will pay all costs and interest."

The Court: What is the subdivision here?

Mr. Heily: II, your Honor, of the insuring agreement.

Mr. Wynn: It is on the second page of the policy.

Mr. Heily: As the court indicates in this California case, you must read the whole of the policy. Taking the pertinent words of that paragraph applicable to this question, [21] we read, "The company agrees to pay all interest accruing after entry of judgment in addition to the applicable limit of liability of the policy."

Let's read it again. "The company agrees to pay the amounts incurred under this insuring agreement." The amounts incurred by whom? Incurred by the assured, of course. The assured has incurred a liability of interest at 7 per cent on $32,000. The company agrees to pay the liability incurred in addition to the applicable limits of the liability.

The Court: May I ask Mr. Wynn, what do you think the policy means when it says all interest accruing after entry of judgment until the company has paid, tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon? What do you mean by "limit of the company's liability"?

Mr. Wynn: The limit is $10,000 as stated on page 1 of the policy. That we have discussed several times.

The Court: Until the company has paid, tendered, or deposited in court such part of such judgment.

Mr. Wynn: Until that time when it is deposited or paid to the injured person, up until that time it must pay interest on what? Here is the language of the policy.

The Court: It says interest on what? On the judgment. That is what the policy says. [22]

Mr. Wynn: That is exactly what they claim here. May I point out from this case, or does your Honor want to consider it?

The Court: Let me see the case. I would rather read it myself.

(Short interruption.)

The Court: Well, I think the words of the court are rather illuminating. The court calls attention to the well established rule that if there is any ambiguity, the contract must be read more strictly against the insurance company than against the parties who received it. The court points out, also, that the court does not have the entire contract, it has only a part of the contract. But the court says:

> "It hardly seems probable, therefore, that the parties to the policy of insurance, after expressly limiting the liability of the company to the principal sum of $10,000, intended to make them liable for interest on any greater amount."

I think that is good law. It hardly seems reasonable, after the insurance company would limit its liability to $10,000, that it would then go one step further and increase its liability, although I am satisfied it does increase its liability above the $10,000, because I don't think there is any question there is a liability for costs. [23]

"Surely we would not be justified in so con-

struing the policy, unless it contains language clearly expressing such an intention. We find no such language in the policy."

Now, I think then we have to go back to the policy in question here.

Mr. Heily: There is such language in this policy.

The Court: I don't know. I have indicated before I am trying to interpret the policy literally, what it says. I am not trying to read something here that is not here. It says to pay all interest accruing after entry of judgment. Pay all interest accruing after judgment. It doesn't say pay interest on $10,000. All interest after entry of judgment. Now, there is a time to stop, that is, until the company has paid or tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon. Well, the company never did pay or never did deposit in court the money. I don't think the policy itself is ambiguous. I think the policy is very definite as to what it means.

I am tending to interpret this policy literally. I think the policy itself says the company is to pay all interest upon the judgment unless the company either pays off the limit of its liability or deposits the money in court. I don't know how you can read this any other way. [24]

Mr. Wynn: May I suggest the language, your Honor, is precisely and exactly the same as in the Sampson case. It is almost word for word the language which your Honor is now considering. I read from the policy.

> "All interest accruing after entry of judgment until the company has paid, tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon."

So far it is precisely the same. Counsel has pointed out that in this policy it further provides, "The company agrees to pay the amount incurred under this agreement in addition to the principal amount of the policy." In addition to the $10,000, as in the Sampson case, it is agreeing to pay interest. The whole question is interest on what?

In the Sampson case, reading the interest clause that your Honor has read, and I have read, the Supreme Court said it obviously means interest on the company's liability and it would be absurd to think that the company proposes to pay interest on $190,000.

Mr. Heily: Your Honor, how are we going to reconcile the closing clause of that paragraph with the clause that they shall pay all interest unless— We state it clearly shows from the policy that that means all interest on the [25] judgment.

The Court: I would be inclined to go along with you in literally reading that policy, but we have here an interpretation of the Supreme Court. How are we going to get around it? "All interest accruing after the entry of judgment," and in that case there was a judgment for more than $10,000. "Until the company has paid, tendered, or deposited in court such part of such judgment as does not exceed the limits of the company's liability."

I may not agree with the Supreme Court, but I have got to follow it.

Mr. Heily: That case ends there, you see. They don't have the clause in that case that we do in this policy.

The Court: You have this clause about paying interest pretty nearly word for word.

Mr. Heily: I agree, and the court, I believe, is right in deciding as they did on that case with the clause that they had, but our policy does not stop there. Our policy goes on to say the company agrees to pay the amounts incurred. By whom? The insured, of course. That means interest on $32,000. The company agrees to pay the amounts incurred under this agreement in addition to the applicable limits of the liability of this policy. You see, this policy goes further.

The Court: Where is that clause? [26]

Mr. Heily: That is at the close of paragraph II of that insuring agreement. It is all inclusive. It is not a subdivision paragraph. It is part of the same paragraph of that insuring agreement. The most we can say for the defendant, your Honor, is that creates an ambiguity which must be interpreted against them.

The Court: Well, I am going to have to hold against you, Mr. Heily. I think the Supreme Court case is binding.

Mr. Heily: I would like to quote to you from this federal case. It states, "An examination of different policies brought to this court discloses that they usually contain a provision limiting the right

to recover interest on that portion of the judgment which the company has obligated itself to pay. But the policy in suit contains no such limitation, and we do not feel at liberty to insert such limit into the policy so as to make a new contract for the parties."

That is what we would be doing here if we limited interest to just $10,000.

The Court: I am going to rule in this case the interest is limited to $10,000, that you are entitled to recover the $10,000 plus interest, plus the court costs.

Also, I am going to deny the motion for a directed verdict, although I feel that there is some merit to the argument of Mr. Wynn. Nevertheless, I feel that this is [27] a question of fact. The fact was presented to the jury. The jury found that there was no lack of cooperation, and under the circumstances of this case I would not be justified in setting aside the verdict of the jury.

Such will be the order.

Mr. Wynn: If the court please, may I ask for a reasonable stay of execution, 20 or 30 days?

The Court: Well, perhaps Mr. Heily will want to appeal, also. If I get both sides to appeal a case, I think I have done pretty well. How much stay do you want?

Mr. Wynn: I would like 30 days. I probably will not require that much.

The Court: You ought to be able to do it in less than 30 days.

Mr. Wynn: 20 days, then, your Honor.

The Court: I will grant a stay for 20 days. What shall we do about the other defendant? Mr. Heily doesn't want to dismiss the other defendant.

Mr. Wynn: I don't know what I can do.

The Court: You can't dismiss the other defendant, so I guess we will have to let the other defendant stay. If he wants to get out of this case, he will have to come down and make a motion. If he makes a motion, I will be able to make a ruling on it. [28]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 31st day of July, 1951.

/s/ S. J. TRAINOR,
Official Reporter.

[Endorsed]: Filed July 31, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 78, inclusive, contain the original Petition for Removal of Cause to United States District Court and exhibits thereto; Answer of Defendant, Standard Accident Insurance Company of Detroit, Michigan; Answer of Defendant Thomas B. Mack; Plaintiff's Memorandum Prior to Trial; Defendant's Memorandum Pursuant to Local Rule 12; Verdict; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Notice of Appeal from Part of Judgment; Affidavit of Service of Notice of Appeal; Statement of Points; Designation of Record; Designation of Record to be Prepared on Behalf of Standard Accident Insurance Company of Detroit, Michigan; Statement of Points Relied on by Standard Accident Insurance Company of Detroit, Michigan; and Motion and Order for Extension of Time to File Record and Docket Appeal which, together with original Mach's Exhibit #1, Winger Exhibits 1 to 5, inclusive, and Defendant's exhibits A to F, inclusive, and original reporter's transcript of proceedings on March 27, 28, and 29, 1951 and April 6, 1951, transmitted herewith, constitute the record on the appeals to the United States Court of Appeals.

I further certify that my fees for preparing and certifying the foregoing record amount to $2.00 one-

half of which has been paid by each of the appellants and cross-appellants.

Witness my hand and the seal of said District Court this 6th day of August, A. D. 1951.

[Seal] EDMUND L. SMITH,
Clerk,

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 13047. United States Court of Appeals for the Ninth Circuit. Standard Accident Insurance Company of Detroit, Michigan, Appellant, vs. Vivian Winget and Thomas B. Mack, Appellees. Vivian Winget, Appellant, vs. Standard Accident Insurance Company of Detroit, Michigan and Thomas B. Mack, Appellees. Transcript of Record. Appeals from the United States District Court for the Southern District of California, Central Division.

Filed August 7, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12327-HW (U. S. Dist. Ct.)

VIVIAN WINGET,
Plaintiff, Appellee and Appellant,

vs.

STANDARD ACCIDENT INSURANCE COMPANY OF DETROIT, MICHIGAN, a Corporation,
Defendant, Appellant and Appellee.

THOMAS B. MACK, JOHN DOE I and JOHN DOE COMPANY,
Defendants.

STATEMENT OF POINTS RELIED UPON BY APPELLANT VIVIAN WINGET

To the Clerk of the Above-Entitled Court:

Comes Now the Plaintiff (Appellee and Appellant) Vivian Winget and states the points upon which she intends to rely upon the appeal herein:

1. The trial court correctly found that there was no wilful misrepresentation of facts relating to the accident which constituted a breach of the obligation of the assured to cooperate under the terms of the policy involved in this action.

2. The trial court erred in failing to award to Plaintiff and Appellant a pro-rata share of the Twenty Thousand and no/100 ($20,000) Dollars due and payable under the policy involved in said action. In particular, the court should have awarded Plain-

tiff and Appellant the sum of Three Thousand Six Hundred Seventeen and 02/100 ($3,617.02) Dollars in addition to the Ten Thousand Ninety-seven and 80/100 ($10,097.80) Dollars which the court did award to said Plaintiff.

3. Said court erred in failing to award Plaintiff and Appellant interest at 7% per annum from the 30th day of March, 1950, on the total sum of Thirty-two Thousand Ninety-seven and 80/100 ($32,097.80) Dollars. In particular, said court should have awarded in addition to 7% interest from said date on Ten Thousand Ninety-seven and 80/100 ($10,-097.80) Dollars, interest at 7% per annum from March 30, 1950, on the sum of Twenty-two Thousand and no/100 ($22,000) Dollars.

4. If it be determined that such error prejudiced Plaintiff and Appellant, then the trial court erred in failing to restrain Defendant Standard Accident Insurance Company from settling with or in any maner paying to or compromising with Defendant Thomas B. Mack and in accepting and approving a judgment by stipulation for Six Thousand and no/100 ($6,000) Dollars in favor of Defendant Thomas B. Mack and against Defendant Standard Accident Insurance Company.

Dated this 7th day of August, 1951.

/s/ NEIL D. HEILY,
Attorney for Vivian Winget.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 9, 1951.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS RELIED ON BY APPELLANT STANDARD ACCIDENT INSURANCE COMPANY OF DETROIT, MICHIGAN

To the Clerk of the Above-Entitled Court:

Comes Now the defendant (appellant and appellee) Standard Accident Insurance Company of Detroit, Michigan, and states the points upon which it intends to rely upon the appeal herein.

1. There was a wilful misrepresentation of facts relating to the accident which constitute a breach of the obligation of the assured to cooperate as a matter of law, which breach is a complete defense to an action on the policy by the injured person.

2. The claim of plaintiff herein is limited by the contract of insurance to the total sum of Ten Thousand Dollars ($10,000.00).

3. The plaintiff herein is in any event limited to recovery of interest on the sum of Ten Thousand Dollars ($10,000.00), as against this defendant.

FULCHER & WYNN,

By /s/ CAROL G. WYNN,

Attorneys for Standard Accident Insurance Company of Detroit, Michigan.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 9, 1951.